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**REPORTS**

**OF**

**CASES AT LAW AND IN EQUITY**

**DETERMINED BY THE**

**SUPREME COURT**

**OF THE**

**STATE OF IOWA**

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**MAY AND SEPTEMBER TERMS, 1910**

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**BY**

**W. W. CORNWALL**  
**REPORTER**

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**VOLUME XXXI.**

○ **BEING VOLUME CXLVIII OF THE SERIES.**

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**CHICAGO, ILLINOIS:**

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JOHN C. SHERWIN, Cerro Gordo County.

EMLIN McCLAIN, Johnson County.

SILAS M. WEAVER, Hardin County.

SCOTT M. LADD, O'Brien County.

W. D. EVANS, Franklin County.

---

## OFFICERS OF THE COURT.

H. W. BYERS, *Attorney General*, Shelby County.

HENRY L. BOUSQUET, *Clerk*, Marion County.

W. W. CORNWALL, *Reporter*, Clay County.

# JUDGES OF THE COURTS.

FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

## DISTRICT COURTS.

- First District*—H. BANK, JR., Keokuk.  
*Second District*—D. M. ANDERSON, Albia; F. W. EICHELBERGER, Bloomfield; M. A. ROBERTS, Ottumwa; C. W. VERMILLION, Centerville.  
*Third District*—H. M. TOWNER, Corning; HIRAM K. EVANS, Corydon.  
*Fourth District*—DAVID MOULD, Sioux City; F. R. GAYNOR, Le Mars; J. F. OLIVER, Onawa; WILLIAM HUTCHINSON, Alton.  
*Fifth District*—J. D. GAMBLE, Knoxville; J. H. APPLGATE, Guthrie Center; EDMUND NICHOLS, Perry.  
*Sixth District*—K. E. WILLCOCKSON, Sigourney; BYRON W. PRESTON, Oskaloosa; W. G. CLEMENTS, Newton.  
*Seventh District*—ARTHUR P. BARKER, Clinton; A. J. HOUSE, Maquoketa; D. V. JACKSON, Muscatine; JAMES W. BOLLINGER, Davenport.  
*Eighth District*—RALPH P. HOWELL, Iowa City.  
*Ninth District*—LAURENCE DE GRAFF, Des Moines; HUGH BRENNAN, Des Moines; W. H. MCHENRY, Des Moines; JAS. A. HOWE, Des Moines.  
*Tenth District*—CHAS. E. RANSIER, Independence; FRANKLIN C. PLATT, Waterloo.  
*Eleventh District*—R. M. WRIGHT, Ft. Dodge; C. E. ALEROOK, Eldora; C. G. LEE, Ames.  
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*Seventeenth District*—C. B. BRADSHAW, Toledo; JNO. M. PARKER, Marshalltown.  
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*Nineteenth District*—ROBERT BONSON, Dubuque; MATTHEW C. MATTHEWS, Dubuque.  
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REPORTS  
OF  
CASES AT LAW AND IN EQUITY  
DETERMINED BY THE  
SUPREME COURT  
OF THE  
STATE OF IOWA  
AT  
DES MOINES, MAY AND SEPTEMBER  
TERMS, 1910.  
AND IN THE SIXTY-FOURTH YEAR OF THE STATE.

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T. E. FORD and J. E. FORD, under the firm name and style of FORD BROTHERS, Appellants, v. BOARD OF PARK COMMISSIONERS OF THE CITY OF DES MOINES, IOWA, Appellees.

**Board of park commissioners:** EMINENT DOMAIN: ABANDONMENT OF PROCEEDING: DAMAGES. A board of park commissioners has power to condemn property for public purposes under the law relating to the taking of property for public improvement, is an instrumentality of government, and in the absence of statute is not liable in damages to private individuals for an exercise or non-exercise of its powers, as for the abandonment of condemnation proceedings, not unreasonably delayed, whether acting negligently or maliciously. But under the express provision of our statute relating to condemnation proceedings and providing that if a corporation declines to take the property and pay the damages awarded on final determination of the proceeding, it shall pay in addition to the costs and damages suffered reasonable attorney's fees,  
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damages may be recovered by the land owner on the abandonment of condemnation proceedings instituted by the board of park commissioners against his land.

*Appeal from Polk District Court.*—HON. JAMES A. HOWE,  
Judge.

THURSDAY, JUNE 16, 1910.

ACTION at law to recover damages growing out of the conduct of the defendant in the matter of condemning plaintiff's property for the purposes of a public park. Defendant demurred to plaintiff's petition as amended, and its demurrer was sustained. Plaintiffs appeal.—*Reversed.*

*John McLennan*, for appellants.

*J. M. Parsons* and *Eskill Carlson*, for appellee.

DEEMER, C. J.—Defendant was the board of park commissioners of the city of Des Moines, and it is charged that in the month of May, 1905, it caused a notice to be served upon plaintiffs and others that said board required for park purposes certain property belonging to plaintiffs; that at this time plaintiffs were the owners and were erecting on said premises a building intended for a laundry and had leased said building then in the course of erection and to be erected to the Troy Laundry Company; that appraisers were appointed and they on the 29th day of May, 1905, assessed the damages and value of plaintiff's property at \$6,000; that on the 26th day of June, 1905, plaintiffs and appellants appealed to the district court of Polk County, Iowa, from the findings of said appraisers, and that thereafter and on the 17th day of August, 1905, defendant board withdrew its petition to condemn the lands in question and so notified plaintiffs. Plaintiffs further alleged that between the month of May, 1905, and the 17th day of

August, the same year, the plaintiffs ceased to further construct said building, and did so under the belief that defendant would take said premises for park purposes, and that said Troy Laundry Company was so notified and was required and did secure another location by means of which plaintiffs lost a tenant at the yearly rental of \$600 per annum, and that, after the withdrawal of defendant's petition to condemn said premises, plaintiffs, who had planned said building and partially constructed the same for such purposes, and after they had lost their tenant, were compelled to remodel said structure for another purpose than originally intended and to their great loss and damage.

Defendant demurred to the pleadings reciting these facts upon the following grounds:

That the defendant, board of park commissioners, is a municipal agency of the city of Des Moines by and through which the said city exercises certain of its governmental functions, and the said board is not subject to any liability arising out of or in consequence of the exercise by it of governmental functions authorized by law, and that in instituting and carrying on and in the abandonment of said condemnation proceedings it acted in the manner and under authority conferred by law. (2) The said action is to recover damages for the doing of an act authorized and permitted by law and in the manner authorized by law, and its acts were not unlawful.

This demurrer having been sustained, the case was appealed to this court, and the questions presented for our consideration are: Do the facts admitted by the demurrer constitute a cause of action in plaintiffs' favor for substantial damages? At the time the acts complained of were committed, the Legislature of the state had enacted the following provisions with reference to the powers and duties of park commissioners:

It may acquire real estate within the city for park

purposes, by donation, purchase or condemnation, and take the title to the members thereof as a board and their successors in office in trust for the public, and hold the same exempt from taxation. It may sell or exchange any real estate acquired by it which shall be found unfit or not desirable for such purposes; shall keep a record of all transactions, and have exclusive control of all the parks and pleasure grounds acquired by it, and of any other ground owned by the city and set apart for like purposes; and may make contracts, sue and be sued, but shall incur no indebtedness in excess of the amount of taxes already levied and available for the payment thereof, except bonds hereby authorized. Code, section 853.

If said board and the owners of any property desired by it for park purposes can not agree as to the price to be paid therefor, it may cause the same to be condemned in the manner provided for taking land for city purposes. Code, section 858.

Cities and towns shall have power to purchase or provide for the condemnation of, pay for out of the general fund, enter upon and take, any lands, within or without the territorial limits of such city or town, for the following purposes: (1) For parks, commons, cemeteries, crematories or hospital grounds: . . . (3) For any other purposes provided in this title, and in all cases where such purchase or condemnation is now or may hereafter be authorized. Code, section 880.

Proceedings for condemnation of land as contemplated in this title shall be in accordance with the provisions relating to taking private property for works of internal improvement except that the jurors shall have the additional qualification of being freeholders of the city or town. Code, section 884.

The amount of damages shall be ascertained and entered of record, and if no money has been paid or deposited with the sheriff, the corporation shall pay the amount so ascertained, or deposit the same with the sheriff, before entering upon the premises. Should the corporation decline to take the property and pay the damages awarded on final determination of the appeal, then it shall pay, in addition to the costs and damages suffered by the landowner, reasonable attorney's fees, to be taxed by the court. Code, section 2011.

From these statutes, it will be observed that the board of park commissioners is a corporation or quasi corporation having power to contract, to sue and to be sued, and to condemn property for public purposes. In performing its duties by condemnation, it is required to proceed under the law relating to the taking of property for works of public improvement. Now, there is no claim made in the petition of any trespass upon plaintiff's property, nor could there well be against the defendant as a public corporation. The action was evidently brought upon the theory that the abandonment of the proceedings under the facts alleged constituted an actionable wrong, or that the defendant through its members acted wantonly, maliciously, and without right. It is alleged in the petition that defendant, assuming to act with authority of law, but in truth and in fact contriving and intending to injure plaintiffs in the free enjoyment of their property, caused a notice to be served, etc.;

That said board of park commissioners were not and did not act in good faith in the manner of the condemnation and proceedings affecting said property, but that said proceedings were instituted by it in pursuance of and in furtherance of a plan and scheme conceived prior to the service of the notice 'Exhibit A'; that said proceedings were instituted by the defendant with the principal object in view, to obstruct, hinder, delay, prejudice, and injure these plaintiffs, and to deprive and prevent them from making certain improvements, and perfecting certain contemplated plans looking to the use of said property, and to hinder, obstruct, and deprive these plaintiffs in the free exercise and enjoyment of their property in this, to wit: That it became known in a general way that plaintiff's plans and uses of said property above described or some part of the same contemplated causing a laundry to be operated and conducted in one of the buildings situated on said real estate, and that said real estate lies adjacent to several churches and buildings dedicated to religious worship, and that by reason of influence exercised by those



interested on the individuals composing the board of park commissioners or some of them said defendant board of park commissioners was prompted, prevailed upon, and induced to institute said condemnation proceedings so that those desiring said premises for laundry purposes would be (and were) obliged to look elsewhere for suitable quarters in which to conduct and operate said laundry, and thereby then and there to deprive these plaintiffs of the free exercise and enjoyment of their said property and the loss of rents and profits which said property would otherwise earn; that these plaintiffs charge the fact to be that the said board of park commissioners did not desire or require said premises or any part thereof for park purposes, but that in truth and in fact in causing condemnation proceedings to be instituted said board was actuated by the desire to assist and help others as hereinbefore stated who were unreasonably apprehensive that the use of said property for laundry purposes or some part thereof might prove obnoxious in the neighborhood.

It was alleged that plaintiffs had been put to expense for attorneys and counsel fees in the matter of the appeal, and damages in the aggregate in the sum of \$5,000 was asked.

The proceedings were commenced on May 18, 1905, and were abandoned on the 14th day of August of the same year after an appeal to the district court but before any hearing was held in that court. This delay was not so long as that any one would be justified in holding it unreasonable; and, in the absence of such a showing, it is generally held in the absence of statute that no action lies for the abandonment of *ad quod damnum* proceedings. *Chicago, St. L. & W. R. R. Co. v. Gates*, 120 Ill. 86 (11 N. E. 527); *Burlington & M. R. Co. v. Sater*, 1 Iowa, 421; *Hunting v. Curtis*, 10 Iowa, 152; *Hastings v. B. & M. R. R.*, 38 Iowa, 316; *Corbin v. Railroad*, 66 Iowa, 73; *Gear v. Dubuque & S. C. R. R.*, 20 Iowa, 523; *Nelson v. Goodykoontz*, 47 Iowa, 32. There are quite a number of cases from other jurisdictions which seem to hold that, if the

abandonment is delayed an unreasonable length of time, an action for damages will lie. *Vide, McLaughlin v. Municipality*, 5 La. Ann. 504; *Norris v. Mayor*, 44 Md. 599; *Mayor v. Musgrave*, 48 Md. 272 (30 Am. Rep. 458); *Black v. Mayor*, 50 Md. 235, (33 Am. Dec. 320); *Major v. Black*, 56 Md. 333; *Leisse v. St. L. & I. R. R.*, 72 Mo. 561. But see in this connection, *Whyte v. City*, 22 Mo. App. 409; *Van Valkenburgh v. Milwaukee*, 43 Wis. 574. Apparently, *contra, Feiten v. Milwaukee*, 47 Wis. 494-499 (2 N. W. 1148). Perhaps as many, if not more, of the courts, have reached an opposite conclusion. See *Martin v. Mayor*, 1 Hill (N. Y.) 545; *Bergman v. St. P., S. & T. R. R.*, 21 Minn. 533; *Stevens v. Danbury*, 53 Conn. 9 (22 Atl. 1071); *Carson v. City of Hartford*, 48 Conn. 68. To meet this situation, statutes have been passed in many states giving a right of action, as in Massachusetts and Minnesota. These have been construed in *Drury v. Boston*, 101 Mass. 439; *Whitney v. Lynn*, 122 Mass. 338; *Minnesota & N. W. R. R., v. Woodworth*, 32 Minn. 452 (21 N. W. 476).

We have heretofore in many of the cases followed the rule of nonliability in the absence of statute as will be observed from the opinions already cited. Of course, an action of trespass will lie if the facts pleaded constitute such a wrong; but there is no claim made in the petition of any such actionable wrong. If plaintiffs are entitled to recover them, it is because of the fact that the members of the board were actuated by bad faith and proceeded with the malicious or wrongful intent of injuring the plaintiffs, or because plaintiffs are entitled to recover damages under section 2011 of the Code, hitherto quoted. The individual members of the board were not made parties to this action, and their liability is not before us for determination. The board as such, was an instrumentality of government, having such powers and such only as were granted or necessarily implied, and it was not liable in damages to

private individuals for the exercise or nonexercise of its powers so granted. *McFadden v. Town*, 119 Iowa, 321; *Lahner v. Williams*, 112 Iowa, 428; *Packard v. Voltz*, 94 Iowa, 277. As defendant was purely a governmental agency vested, among other things, with judicial and legislative powers which it could exercise at its discretion, the doctrine of nonliability exists in the absence of statute, for nonuser or misuser of its powers or for the acts of its officers or agents through which such governmental functions are performed and as the doctrine of *respondeat superior* does not apply to such cases the board is not liable for the torts or wrongs of its agents whether done negligently or maliciously. See cases heretofore cited from this state, and *Caldwell v. Boone*, 51 Iowa, 687; *Saunders v. Ft. Madison*, 111 Iowa, 102; *Ogg v. Lansing*, 35 Iowa, 495; *Elmore v. Drainage Com.*, 135 Ill. 269 (25 N. E. 1010, 25 Am. St. Rep. 363). The reasons given for these rules are well understood, and need not be repeated here. Whether or not the individual members of the board might have been held liable is a question with which we have nothing to do at this time.

The final question then is the liability of the board under section 2011 of the Code. The latter part of that section provides that, if the corporation fails to take the property and pay the damages awarded on the appeal, it shall pay in addition to the costs and damages actually suffered by the landowner reasonable attorney's fees to be taxed by the court. This provision was added by the Legislature passing the Code of 1897, and does not seem to have been heretofore considered by this court. That it has reference to an abandonment of the proceedings is manifest, but it is not so clear as to what is meant by the term costs and damages actually suffered by the landowner and reasonable attorney's fees to be taxed by the court. It seems to us, however, that this statute was intended to cover a case of abandonment such as is now presented, and that it follows

to some extent at least the statutes of Massachusetts and Minnesota to which reference has heretofore been made. It is to save to the owner his costs and actual damages when the proceedings are abandoned and to give him attorney's fees necessarily expended in securing his compensation for the land and protecting his rights. These attorney's fees are to be fixed by the court; but they are nevertheless a part of his damages. With the measure of plaintiff's damage we have no present concern, although, if that point be reached, it will be difficult of solution. Defendant makes no claim that the damages are remote, contingent, speculative, or merely nominal. Its sole contention is that there is no liability whatever, and, were it not for the amendment to section 2011 of the Code, we should be compelled to agree with it. But as that section clearly imposes a liability and the question of the amount and character of damages is not before us, and is not argued, we must assume that some of the substantial damages claimed are recoverable. The cases from Massachusetts and Minnesota throw light upon this question, and lend support to the conclusion reached that there is liability on the part of the defendant for the actual damages suffered by plaintiff as well as reasonable attorney's fees.

That being true, the judgment of the trial court must be, and it is, *reversed*.

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H. CRASWELL V. PURE BRED CATTLE COMMISSION CO.,  
ET AL., Appellants.

**Partnership:** SETTLEMENT OF FIRM DEBT BY ONE PARTNER: LIABILITY OF  
I OTHER PARTNERS. Acceptance of the individual note of one of two or more members of a partnership who are jointly and severally liable does not constitute a settlement of the claim against the other members of the firm, in the absence of its express acceptance for that purpose.

**Same:** EVIDENCE. Testimony of the partner giving his note for a firm debt that the other partners understood the transaction to be a full settlement of the partnership liability was inadmissible, because a conclusion drawn from facts not appearing in the record. And as the note in question was signed by the partner in his individual capacity, evidence as to whether he had authority to sign the partnership name was immaterial, especially as his authority to act for the partnership was not an issue.

*Appeal from Woodbury District Court.*—HON. JOHN F. OLIVER, Judge.

THURSDAY, JUNE 16, 1910.

ACTION to recover the amount alleged to be due from defendants, Charles Escher, Jr., H. R. Ryan, and E. G. Ryan, engaged in business as a partnership under the name of the Pure Bred Cattle Commission Company, for cattle of plaintiff's sold by defendants as commission merchants. The defendants alleged settlement consisting of the acceptance by plaintiff of the individual note of H. R. Ryan for the amount of plaintiff's claim. The case was tried to the court without a jury, and judgment was rendered for plaintiff, from which defendants appeal.—*Affirmed.*

*R. H. Brown*, for appellants.

*E. J. Stason*, for appellee.

McCLAIN, J.—The evidence tended to show that the defendants received plaintiff's cattle for sale and sold them on plaintiff's account, H. R. Ryan, the manager of the partnership, acting for the firm in the transaction; that about eight months after the sale was made, and after plaintiff had repeatedly demanded payment from defendant, H. R. Ryan, acting as manager, the plaintiff accepted from Ryan his personal note for the amount due to plaintiff from defendants; and that this note, which was past

due before this action was instituted, had never been paid and was still in the possession of the plaintiff. A return of Ryan's note was tendered.

Under these facts, which we are justified in assuming the court found to be established by the evidence (which finding has the force and effect of the verdict of a jury),

the only question of law involved is whether the acceptance from one of two or more members of a partnership of the individual note of such member constitutes a settlement of a claim as against the other partners. This question is easily answered. The acceptance of the note of one of two or more debtors jointly and severally bound does not presumptively constitute a settlement of the claim. *McLaren v. Hall*, 26 Iowa, 297; *Edwards v. Trulock*, 37 Iowa, 244. The claim of defendant that there was an express acceptance of the note in satisfaction of the amount due from defendants to plaintiff was not supported by the proof, and the mere receipt of the note does not give rise to any implication that it was received in settlement.

Some claim is made in argument that the transaction with H. R. Ryan constituted a merger of the indebtedness of the defendants, and also that it was a novation. Something further is said as to estoppel. But none of these matters were pleaded, and there was no evidence to support appellants' contention on these grounds. No discharge or satisfaction or release is to be implied from the mere acceptance of the note.

The claim that the court erred in sustaining an objection to a question asked of H. R. Ryan, testifying for defendants, as to whether the other defendants understood

that the giving of the note was a settlement of the indebtedness is without foundation, for plainly the witness could not say what the understanding of the other members of the partnership was. His statement in that respect would be a mere conclu-

1. PARTNERSHIP:  
settlement of  
firm debt by  
one partner:  
liability of  
other partners.

2. SAME:  
evidence.

sion or inference from facts not appearing in his testimony or otherwise. Equally without merit is the claim that the court erred in sustaining an objection to a question asked of the same witness as to whether he had any authority to sign the partnership name to a note except by himself as manager. It did not appear that he signed the note in question as manager, and, in any event, his authority to act for the partnership was not in controversy. The judgment is *affirmed*.

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C. S. MEARDON, Appellant, v. IOWA CITY, IOWA, Appellee.

**Municipal corporations: CHANGE IN STREET GRADE: DAMAGES: IN-**  
1 **STRUCTIONS.** The benefits resulting to abutting property from a change of the street grade are to be considered in connection with the disadvantages resulting from the change in determining the damages to the property.

**Same:** An instruction to the effect that abutting property is improved  
2 according to an established grade when it is so improved that it can be comfortably used for the purpose to which it is devoted, while the street is maintained at that grade, and that where improvements are made subsequent to the establishment of a permanent street grade, to authorize recovery of damages for a change in the grade the improvement must have been made according to the established grade, was correct.

**Evidence: WHEN NOT CONCLUSIVE.** The mere fact that plaintiff, alone,  
3 testified in support of the material allegations put in issue by the answer will not entitle him to have his evidence treated as conclusive on the issues.

**Change in grade: DAMAGES: INSTRUCTION.** A change of street grade  
4 is an actual physical change in the surface of the street, and where an established grade is changed after property has been improved with respect thereto without injuring the value of the property the city is not liable for such change; and where a city commences the work of changing the grade, but ceases operations for such length of time as to make it appear that the work is completed, the owner of abutting property can only recover for such injury as was occasioned by the work that had been done.

*Appeal from Johnson District Court.*—HON. R. P. HOWELL,  
Judge.

THURSDAY, JUNE 16, 1910.

ACTION for damages resulting to plaintiff's property because of change of the established grade of the city. Trial to a jury. Verdict and judgment for defendant. Plaintiff appeals.—*Affirmed.*

*Wade, Dutcher & Davis*, for appellant.

*H. G. Walker*, for appellee.

EVANS, J.—The plaintiff owns and occupies a residence property on Summit Street in the defendant city. The plaintiff purchased the property with dwelling house thereon in the year 1904. A permanent grade had been established by ordinance in the year 1903; but the dwelling house upon plaintiff's property had been built some years prior to such date. Plaintiff testified as follows: "A. Subsequent to the time I bought that property, I put improvements on it. I made connections with the sewer and water, put in a furnace, terraced my lot, did some shingling and painting and general fixing up, making the house modern, put in plumbing, hot water, dug out the cellar and installed the furnace, built a bathroom and fitted it up, and made a brick drive. When I made these improvements, I thought I had a permanent grade. A permanent walk had just been laid the fall before, about nine months previous. There was no change made in this grade until July or August of 1908. At that time the drive part of the street was lowered something like a foot or better." After these improvements were made, and in the summer of 1908, an ordinance was enacted changing the grade of such street



about one foot. The immediate circumstances attending this change of grade, as claimed on behalf of defendant, were that it was about to pave such street, and that the change of grade as made was necessary for the purpose of drainage. The street was sixty feet in width. Fifteen feet on each side of the street were devoted to parking, and only thirty feet were reserved for the purpose of a roadway. Although the ordinance in terms applied to the street in its full width, the physical changes were confined to the thirty feet of roadway. In the physical change actually made, there was no interference with the parking nor with the curbing thereon, nor with the sidewalk, and no such change is contemplated. The plaintiff's property abuts upon no alley, and access to his property by a team or vehicle is had by a driveway extending from the street proper across the parking and the sidewalk over plaintiff's ground. The particular injury of which complaint is made by plaintiff in his evidence is that the lowering of the grade of the street proper has rendered the driveway more difficult of access.

Thirteen alleged errors are assigned for our consideration. Many of these are so related to each other that we will consider them together, rather than separately. Appellant's principal complaints center about instructions five, six and seven, as given by the court.

I. Instruction number five is as follows: "(5) Now, the first question for you to determine in this case is whether or not the plaintiff has been damaged. If you have found that he has been damaged, then you are instructed that the measure of his damages is the difference in the value of the property as it was just before the change of grade and as it was just after as affected by the change. If, because of benefits resulting to the property from the change, it is rendered as valuable or more so than before,

1. MUNICIPAL  
CORPORATIONS:  
change in  
street grade:  
damages:  
instructions.

there is no damage. You may consider resulting benefits, if any, and the improvement of the street as contemplated by the ordinance changing the grade." It is challenged by appellant because it permitted the jury to consider benefits resulting to the property from the change of grade. It is also argued that its effect was to permit the jury to consider benefits to result from the paving of the street. We do not think the instruction is capable of this latter construction. That benefits resulting from the change of grade are to be considered by the jury in connection with the disadvantages resulting therefrom is the settled rule in this state. *McCash v. Burlington*, 72 Iowa, 27; *Stewart v. City of Council Bluffs*, 84 Iowa, 61. The instruction as given is in strict accord with our previous holdings.

II. Instruction number six as given by the court was as follows: "(6) You are instructed, however, that, if improvements were not made on plaintiff's property subsequent to the establishment by the defendant  
2. SAME. city of a permanent grade on Burlington Street in front of the property, plaintiff could not recover in this action, and you are instructed that, if improvements were made on plaintiff's property subsequent to the establishment by the defendant city of a permanent grade on Burlington Street in front of plaintiff's property, unless you should find that such improvements were made according to such established grade, that plaintiff could not recover. You are instructed that property is improved according to an established grade whenever it is so improved that it can be comfortably and conveniently used for the purpose to which it is devoted while the street upon which it abuts is maintained at the grade so established." A somewhat general complaint is made of this instruction to the effect "that it does not properly state the rule of law applicable to such cases." The argument is directed more particularly against the last sentence thereof. Suffi-

cient to say that this is a substantial copy of the language used by this court in previous opinions. *Richardson v. Sioux City*, 136 Iowa, 436; *Stevens v. Cedar Rapids*, 128 Iowa, 227; *Conklin v. City of Keokuk*, 73 Iowa, 343.

It is also urged that by this instruction the court submitted to the jury questions which were not in controversy. It is said in argument that "plaintiff is the only person to testify on this subject, and the defendant offered no evidence to contradict it, and the same must therefore be accepted as conclusive." We can not accede to this contention. This evidence of the plaintiff was given in support of certain allegations of his petition. These allegations were denied generally and specifically in the answer. They related to matters which were peculiarly within the knowledge of the plaintiff himself. It is true that the defendant offered no evidence in contradiction of the testimony of the plaintiff. This fact, however, did not relieve plaintiff of the burden of proof; nor did it entitle him to have his evidence regarded as conclusive. If the facts had been admitted or conceded on the trial, a different situation would arise, and this is all that is held in the cases cited by appellant. *Garvick v. Railroad Co.*, 124 Iowa, 691; *Williams v. Railroad Co.*, 121 Iowa, 270. It is doubtless true, also, that the evidence on both sides may be so concurrent as to certain facts that the trial court should deem them as established. But in such cases it would be difficult to lay a strict line, and some latitude must be allowed to the trial court. All we hold now is that, where material allegations of the petition are put in issue by the answer, the mere fact that plaintiff alone testifies in support of the same does not, as a matter of law, entitle the plaintiff to have his evidence deemed conclusive.

III. Complaint is also made of the seventh instruction, which was as follows: "(7) You are further in-

3. EVIDENCE:  
when not  
conclusive.

4. CHANGE IN GRADE: damages: instruction.

structed that if you find that improvements were made on plaintiff's property subsequent to the establishment of a permanent grade on Burlington Street in front of plaintiff's property, and that such improvements were made according to the established grade, but do not find such grade was thereafter altered by the defendant city in such manner as to damage, injure, or diminish the value of the property in controversy, then your verdict will be for the defendant. You are instructed that by change or alteration of the grade of a street is meant actual physical change in the surface of the street, and no claim for damages exists on any other account than for an injury done by work actually performed. You are further instructed that, if defendant city did work in altering the grade in front of plaintiff's property and then ceased operations for such length of time as to make it appear that the work is completed, plaintiff would only be entitled to recover, if at all, for the injury, if any, occasioned by what was done, but for nothing more." It is sufficient to say that this instruction also is a substantial copy from our previous opinions, and it is justified by our previous holdings at every point. *Buser v. Cedar Rapids*, 115 Iowa, 683; *York v. Cedar Rapids*, 130 Iowa, 453; *Foley v. Cedar Rapids*, 133 Iowa, 64; *Farmer v. Cedar Rapids*, 116 Iowa, 322.

IV. Appellant complains also of certain rulings made by the court in the introduction of evidence. Some of these complaints are fully covered by what we have already said, and we will not enter into further discussion of them.

We have carefully examined all of the alleged errors assigned and argued and find none of them to be well taken.

The judgment of the trial court must therefore be affirmed.

PHOEBE MIINCH, Appellee, v. JACOB MIINCH, ET AL.,  
Appellant.

**Conveyances: FRAUD: FINDINGS OF COURT: CONCLUSIVENESS.** The  
1 finding of the trial court that the deed involved in this action  
was delivered, that the grantor was mentally competent to execute it, and that it was valid as to him, was of necessity a finding against the contention that the deed was executed through fraud.

**Same: CONSIDERATION: MENTAL CAPACITY OF GRANTOR: EVIDENCE.** In  
2 this action the sons of grantors remained at home with their parents for several years after their maturity and until they were married, working and improving their father's farm and from the income of the farm, as a result of their labor, purchased other land. By an agreement with the sons to pay them a certain amount annually and to otherwise provide for them the parents executed conveyances of the land to the sons.

*Held*, that there was sufficient consideration for the conveyances; and also that the conveyances were valid as against a claim of mental incapacity of the mother at the time of the execution of the same.

**Same: DELIVERY.** Where the wife voluntarily joins the husband in  
3 the execution of a deed its delivery by him is effectual as against the wife.

*Appeal from Delaware District Court.*—HON. CHARLES E.  
RANSIER, Judge.

THURSDAY, JUNE 16, 1910.

ACTION in equity to set aside certain conveyances of real estate. There was a decree granting partial relief. Defendants appeal.—*Reversed*.

*Yoran & Yoran and Dunham, Norris & Stiles* for appellants.

*A. M. Cloud and Bronson, Carr & Sons, for appellee.*

EVANS, J.—Since the entering of the decree below, the above named plaintiff has died, and her administrator has been substituted as a party plaintiff. As the record is made, it will be more convenient for us to refer to the original plaintiff in our discussion of the case and to take no note of the substitution. The plaintiff was the widow of Adam Miinch, who died October 25, 1906. Prior to June 16, 1905, he was the owner of two farms in Delaware county. One of these farms was known as the home farm in Elk township, and consisted of two hundred and sixty-six acres. The other was known as the Coffin Grove farm, and consisted of one hundred and thirty-three acres. He had two sons and two daughters, Jacob, Mary, George and Flora. On June 16, 1905, he procured a notary to prepare two deeds, both of which were executed by himself and wife on that day. One deed purported to convey the Coffin Grove farm of one hundred and thirty-three acres to the son George, and the other purported to convey the home farm of two hundred and sixty-six acres to the son Jacob. They were placed in the hands of the notary with directions to deliver the same to the grantees, respectively, after the death of the grantors. Some days later, he directed the notary to make formal delivery of the deeds to the grantees during his lifetime in order to avoid any question of their legality, and to receive them back from the grantees and to hold them in trust during the lifetime of the grantors, and these instructions were followed by the notary. The plaintiff as widow brought this action to set aside such deeds and to establish her dower in the real estate in question, and made her four children parties' defendant. The two daughters joined with her in her contention, and the only parties defending are the sons, who are the grantees in such deeds. The deeds are attacked upon three grounds, viz.: (1) That they were never delivered; (2) that they were

obtained by fraud and undue influence; and (3) that the plaintiff and her husband were both mentally incompetent to make the same.

The trial court found that there was a sufficient delivery, and that Adam Miinch was competent to make the deeds, and that they were valid so far as he was concerned. This finding necessarily disposes of the question of fraud, although the trial court did not specifically pass upon it. It may be said, also that there is not the slightest evidence in the record of any fraud. The beneficiaries of the deeds were not present when they were executed.

The trial court found, however, that the deeds were invalid as to the plaintiff, and, as we understand the record, this finding is based upon the alleged incompetency of the plaintiff to execute the deeds. That the deeds were executed in pursuance of a previous purpose and understanding is very manifest from the record. Just what the understanding was in its details is not so clear, nor do we find it necessary to ascertain. In a general way the history of the family explains the reason for the conveyances. Jacob was the oldest of the family, and George was four years younger. Jacob had been the "boss" and manager of the farm since a time prior to his attaining his majority. At this time his father owned one hundred and six and two-thirds acres of the home farm, and no more. All of the children were industrious and remained at home until they were married. Mary was married at the age of twenty-four and Flora at seventeen. Each of them received assistance at the time of their marriage to the extent in value of about \$1,000. They and their husbands prospered and each owned valuable farms at the time the father conveyed his farms to the sons. Three or four years after Jacob became of age, one hundred and sixty acres were purchased and added to the home farm. Some years later the Coffin

1. CONVEYANCES:  
fraud: findings  
of court:  
conclusiveness.

2. SAME: consid-  
eration: men-  
tal capacity  
of grantor:  
evidence.

Grove farm of one hundred and thirty-three acres was purchased; both boys continuing at home and farming the land. The newly acquired lands were all paid for out of the proceeds of such farm. George so continued at home until he was thirty-one years of age, at which time he was married and moved upon the Coffin Grove farm, which he has occupied and farmed ever since. It is claimed in his behalf that this was in pursuance of an understanding in the family that the first of the boys to be married should take that farm. He moved upon it about the year 1891, and immediately began to improve it, and had expended upon it prior to his father's death about \$4,000 in improvements. Jacob continued with his parents until he was forty-two years of age, at which time he was married. Thereupon, in 1898, the parents built a home in the town of Greeley upon lots which had been acquired in 1894 and the title to which was taken in the name of the plaintiff; and they moved thereto and occupied the same up to the time of the death of the father. Jacob remained upon the home farm and continued to occupy and farm it, and so continued up to the time of the death of his father. At the time the parents removed to Greeley, there was an arrangement between them and the sons whereby George was to pay them \$200 a year, and Jacob was to pay them \$300 a year and to furnish their fuel and vegetables and perform other filial services, all of which were performed faithfully, except that no payment was made after the death of the father; this controversy having arisen before the period at which such payments fell due. As witnesses, these defendants declared their readiness to perform these payments to the mother as long as she should live, and we assume from the record that they deem themselves liable therefor if the deeds are held to be valid.

That the consideration of the deeds rested in these facts which we have narrated in its principal substance is very clear. Whether there was other consideration to be



performed by way of payment to the sisters does not appear from the testimony further than that the father executed a will on June 24, 1905, wherein he provided that certain payments should be made to the daughters. We have no occasion, however, to go into this question. The sole question presented by this record is whether the deeds in question are valid and effective to convey the title to the grantees of the tracts in question. The trial court held them to be so, so far as Adam Miinch was concerned, and no appeal has been taken from that part of the decree. We have no occasion, therefore, to discuss the evidence on that feature of the case further than to say that we are satisfied that the trial court reached a correct conclusion in that regard. As already indicated, however the trial court found the conveyance invalid so far as the plaintiff herein was concerned. The only question, therefore, for our consideration, is whether the evidence in this record justifies the conclusion that the plaintiff lacked mental competency to execute the deeds at the time they were executed. We have gone through the evidence with much care and are unable to agree with the conclusions of the trial court at this point. We do not think that the evidence in this record will justify a finding of mental incompetency on the part of the plaintiff on June 16, 1905. We think that the great weight of the testimony is convincing that the mental condition of the plaintiff was normal for her years; she being seventy-seven years of age. It appears quite clear, also, that she fully understood the purpose of the deeds, and that this purpose was in harmony with her own wishes. At the time the deeds were made, the grantors had considerable money in the bank. Some time later they gave \$1,000 to the daughter Flora. Since the death of the father the plaintiff gave to Flora an additional \$500. This, however, is said to be in the form of advance compensation for care.

This controversy had its inception among the children.

After the death of the father, the mother went first to the old home with Jacob. Later she went to visit with her daughter Mary. In the meantime the two daughters and George filed a contest against the will, and the brewing trouble among the children made the situation of the mother pitiable enough. But we see no sufficient ground for holding that she lacked mental competency to execute the deed. If the deeds had been voluntary in the sense that they were mere gifts, a different question would arise. But, as already indicated, the consideration behind these transactions was very substantial and would have furnished abundant ground for the interposition of a court of equity to grant relief of some kind to the sons for the years of service rendered and for the improvements placed upon the land.

It is argued that there was no evidence of delivery on the part of the plaintiff. But delivery  
3. SAME: delivery. on the part of the husband was enough; it being shown that the wife voluntarily joined in the execution.

It is our conclusion, therefore, that the deeds must be upheld as valid, and that the decree below must be reversed.

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EMMA C. WOODBURY and ALVIN J. WOODBURY, Appellees,  
v. LLOYD C. HENNING, Appellee, HATTIE MERRITT,  
LELA REEVES, CHARLES N. REEVES and BLANCHE  
FAYE MERRITT, Appellants.

**Evidence:** TRANSACTIONS WITH A DECEDENT: DESCENT AND DISTRIBUTION: FAMILY AGREEMENT. An heir of a decedent is disqualified under the statute to testify to an agreement with the widow, since deceased, which he had a part in making and was personally interested in, by which it was claimed that the widow agreed to accept a life estate rather than her distributive share in decedent's property. In this action the evidence is reviewed and held insufficient to establish an agreement between the widow and

heirs of a decedent by which the widow was to accept a life estate in decedent's land in lieu of her distributive share.

**Same:** DESCENT AND DISTRIBUTION: INTEREST OF WIDOW. Where a husband dies seised of real property, leaving a widow and children, the widow will take a one-third interest in the same in fee, which on her death will pass to her heirs.

**Same:** ESTOPPEL. Where the heirs of a decedent had not shaped their conduct with reference to claimed admissions made by the widow that she owned simply a life estate in the property, neither the widow nor her heirs were estopped by such admission to claim that she took her distributive share in the estate in fee.

*Appeal from Carroll District Court.*—HON. Z. A. CHURCH,  
Judge.

THURSDAY, JUNE 16, 1910.

ACTION for the partition of certain lands at one time owned by John H. Merritt. The trial court granted the prayer of the petition, and some of the defendants appeal.—*Affirmed.*

*Hutchinson & Jacobs*, for appellants.

*Lee & Robb*, for appellees.

DEEMER, C. J.—Appellees have filed a motion to dismiss the appeal, which, as we shall see during the course of the opinion, is without merit. John H. Merritt died intestate February 6, 1897, seised of the land in controversy. He left surviving his widow, Betsy Merritt, and three children. One of these, Emma C. Woodbury, plaintiff herein, was the issue of John H. and Betsy Merritt, and the other two, Chas. C. and Fred F. Merritt, are children of a former marriage; the first wife having died long prior to his marriage to Betsy. Charles C. died in the year 1901, and appellants are his widow and his two

children. Betsy Merritt had been married prior to her marriage to John H. Merritt and by her former husband had one daughter, now deceased. Defendant Lloyd C. Henning is a son of that deceased daughter. No one of the parties in interest has ever been in the actual possession or occupancy of the land, but according to the testimony Betsy Merritt received all the rents and profits thereof from the time of her husband's death down to the time of her demise in the year 1903. From this statement it will be observed that if Betsy Merritt took a fee in any part of the land of her deceased husband, John, that upon her death her estate passed to plaintiff and to defendant Lloyd C. Henning, who is the son of a deceased daughter of Betsy. Appellants, who are the widow and children of Charles C. Merritt, a son of John H., but not of Betsy, would take nothing from her by descent.

They claim in an answer and cross-petition filed by them that:

Upon the death of said John H. Merritt referred to in plaintiff's petition, his widow, Betsy Merritt, orally waived her right to an undivided one-third in value of real estate described in paragraph 2 of said petition in consideration of the use, occupancy, and possession of all of said real estate for the term of her natural life; that by the terms of said oral agreement the said Betsy Merritt was given the use, rents, and profits of all of said real estate for life in lieu of any and all other interest she might have in said real estate, said agreement having been made between the said Betsy Merritt and the children of the said John H. Merritt.

Par. 3. That, upon the making of the said agreement as aforesaid, the said Betsy Merritt took possession of the whole of said real estate, and to the exclusion of the children of the said John H. Merritt, above referred to, received, appropriated, and enjoyed the rents and profits thereof during the whole of her natural life, and until her death, which occurred in the year 1903.

Par. 4. That after the death of said John H. Merritt,

and after the making of said agreement, the said Betsy Merritt orally and in writing represented and held herself out to be the owner of a life estate in the whole of said real estate and to have no other interest therein, and that said Betsy Merritt asserted ownership over the rents and profits of said real estate from the death of her said husband until the date of her own death by virtue of said agreement and representations made by her to the children of said John H. Merritt and to these defendants that she had no other interest in said real estate.

Par. 5. That these defendants and the children of said John H. Merritt relied upon said agreement and representations, and in reliance thereon they have received no part of the rents and profits of said real estate, but have permitted the said Betsy Merritt to hold and receive the same and to exercise her right of ownership over the whole of said real estate under her claim of a life estate therein by reason of said agreement and said representations made by said Betsy Merritt as aforesaid.

Par. 6. That, by reason of the foregoing, the said Betsy Merritt was the owner of only a life estate in said real estate, and that upon her death the said real estate was the absolute property in fee simple of these defendants, Emma C. Woodbury and Fred F. Merritt.

Par. 7. That these defendants as the widow and children of Charles C. Merritt are the owners of and entitled to one-third in value of the real estate described in paragraph 2 of plaintiff's petition, and that plaintiff Emma C. Woodbury is the owner of and entitled to two-thirds in value of said real estate, Fred F. Merritt having deeded to said Emma C. Woodbury his undivided one-third in value of said real estate.

Par. 8. That the defendant Lloyd C. Henning has no right, title or interest in and to said real estate, and the said Betsy Merritt and said Lloyd Henning and all persons claiming by, through, or under said Betsy Merritt are now estopped from claiming any interest in said real estate adverse to the interests of these defendants and Emma C. Woodbury because of the agreement, representations, and conduct of said Betsy Merritt as above set forth.

In order to prove this agreement or understanding as

pleaded, defendant and appellants introduced as a witness Fred F. Merritt, one of the sons of the deceased John H.

1. EVIDENCE:  
transactions  
with a decedent:  
descent and distribution:  
family agreement.

Merritt, who, over the objection that he was an incompetent witness under section 4604 of the Code, testified to an agreement as claimed, the substance of which was that the widow, Betsy, was to have the use of or the rents and profits of all of the land during her natural life, and that, upon her death, the title was to rest in plaintiff Emma Woodbury, Charles C. Merritt, and himself. He admitted that he was a party to the agreement, had a part in the conversation, and was one of the beneficiaries under the arrangement. Manifestly he was an incompetent witness under the section of the statutes referred to and his testimony can not be considered. There is no other testimony of such agreement, save the barest inference from some letters which it is claimed were written by Betsy during her lifetime, in which she stated, so it is claimed, that her interest in the land was simply a life estate. This in itself and without more does not prove any title in the defendants, who are appellants, and the successors of Chas. C. Merritt, a son of John H., but in no manner related to Betsy.

On the face of the records the title to one-third of the land passed, upon the death of John H. Merritt, to Betsy, and upon her death to her children or their heirs;

2. SAME:  
descent and distribution:  
interest of widow.

that is to say, to Emma Woodbury and the son of her deceased daughter. If she took but a life estate in the land, then, of course, appellants would be entitled to a share as successors to Chas. C. Merritt, a son of the deceased. Appellants in this connection tried to prove that there was an agreement whereby the children of John H. Merritt, whether by his first or second marriage, were to have all the land to the exclusion of the successors of Betsy Merritt's daughter by a previous marriage. There is not sufficient

testimony to show such an agreement. There is no question of election to take the homestead for life in lieu of distributive share as provided in section 2985 of the Code, for none of these parties ever lived upon the land. This being true, appellants are not entitled to any part of the one-third of which Betsy died seised unless they can show some contract right thereto, or perhaps a binding estoppel upon the other parties to the case. The letters to which we have referred do not in any way tend to show any agreement whereby appellants would be entitled to any part of the land which Betsy took as the widow of her deceased husband, John.

They claim, however, that they have an interest by some sort of estoppel growing out of the admissions of Betsy made in some letters which it is claimed she wrote to strangers, but which were produced upon the trial. It is not shown that appellants knew anything of these letters until they were introduced upon the trial, and there is an entire absence of testimony that they, in any manner, fashioned their conduct with reference to any admissions made therein. One of the essential elements of an estoppel is wanting. The most that can be said from the testimony is that, after Betsy obtained her title from her husband, she wrote some strangers to the transaction that she had or expected but a life estate in her deceased husband's property. This alone does not prove an agreement, nor in itself constitute an estoppel on anyone. If she consented to take simply a life interest or estate in all, having once received a fee title to one-third, this, to constitute an agreement, must have been pursuant to some arrangement or contract. But the mere admissions do not show with whom the agreement was made. The statements made in the letters were not acted upon by the appellants or by any one for them so far as shown; indeed, it does not appear that any one save strangers to the transaction ever knew of these letters.

3. SAME:  
estoppel.

Appellants made out no case against the record or paper title, and the decree is manifestly correct.

The motion to dismiss the appeal is overruled because the defendant upon whom no notice was served was not a necessary party to this appeal.

The decree of the district court confirming the record or legal titles of the various parties is correct, and it is *affirmed*.

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ROBERT BAYLES, Appellee, v. SAVERY HOTEL COMPANY,  
Appellant.

**Master and servant: INJURY TO SERVANT: SCOPE OF EMPLOYMENT:**

1 EVIDENCE. In this action for injury to a servant while performing a service at the direction of his superior, the question of whether he was acting outside the scope of his duty and as a mere volunteer was, under the evidence, for the jury.

**Same: CONTRIBUTORY NEGLIGENCE: EVIDENCE.** The plaintiff in this  
2 action was directed to perform a duty in an unlighted part of defendant's premises with which he was not familiar, and while doing so fell into an unguarded drain of which he had not been warned and which was not readily discoverable. *Held*, that he was not negligent as a matter of law.

**Same: VICE PRINCIPAL: INSTRUCTIONS.** Authority to hire and dis-  
3 charge men is not of itself a criterion of vice principalship but is a proper circumstance bearing upon that question. But in this action the real controversy was whether plaintiff was acting within the scope of his employment, and if so he was entitled to a safe place to work and to a warning of hidden and unknown danger; so that an instruction on the question of whether his superior was a vice principal, to the effect that plaintiff must prove not only authority of his superior to hire and discharge men but also to direct what plaintiff should do and where and how he should work, was erroneous, only in the sense that it imposed on plaintiff an undue burden; and was not therefore prejudicial to defendant, it being sufficient to show that his superior had authority to direct plaintiff in his work.

**Same.** Where an instruction has the effect simply to put upon plain-  
4 tiff too great a burden the fact that it is inconsistent in that



respect with another correct instruction on the subject was not prejudicial to defendant.

**Same:** DAMAGES: FUTURE PAIN AND SUFFERING. Where the plaintiff's petition alleged pain, suffering, loss of time and permanent injury, and there was evidence tending to sustain the claim of future suffering, that question was properly submitted to the jury.

**Same:** EXCESSIVE VERDICT. The plaintiff in this action was confined to the hospital for two months suffering much pain as the result of his injury, the physical signs of which at the time of the trial, however, consisted only of an extensive scar on the injured limb. *Held*, that the court's action in permitting a verdict for \$2,000 to stand should not be disturbed.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN, Judge.

THURSDAY, JUNE 16, 1910.

ACTION for personal injuries. Verdict and judgment for the plaintiff. Defendant appeals.—*Affirmed*.

*Hewitt & Wright and Thos. J. Guthrie*, for appellant.

*Thos. A. Cheshire*, for appellee.

EVANS, J.—The injuries complained of occurred on the night of August 21, 1908. The defendant was engaged in operating the Savery Hotel at Des Moines. The plaintiff was an employee, and had been in the service of the defendant for eleven days. He was employed by the chief engineer as a "helper to the engineer and fireman on the night shift." His duties were somewhat indefinite, but consisted principally of wheeling in coal to the boiler room, and wheeling out ashes therefrom. On the night in question he was directed by the night engineer, one Hannan, to go to the elevator water tank, and to see how high the water was therein. This elevator tank was located two hundred or three hundred feet distant from the boiler room. The

plaintiff had never been there before and knew its location only in a general way. His course to it led him through a lighted alley. The tank, however, was located in a so-called alcove to one side of the alley, and this alcove was not lighted. There were several such alcoves opening from the alleyway. The tank in question was so situated that it occupied a part of the first and second alcoves. To that part of it located in the first alcove a ladder was attached which was utilized for the purpose of ascertaining the height of the water therein. The plaintiff, however, entered the second alcove, and, while approaching the tank in that way, stepped into a hole in the basement floor which was full of hot water, whereby his left foot was seriously injured. The hole in question was from thirteen to twenty inches in diameter and between two and three feet deep. It was used as a "sump" to receive the overflow of water from the tank and from the cylinder of the pump, and from it the water thus gathered would percolate through the soil and disappear. The water which came from the cylinder was hot, while that from the tank was cold. There was no barrier erected about the hole, but a plank covering was provided for it. This covering seldom maintained its place because the overflow would lift it and carry it to one side. This was its condition at the time of the accident. At this particular time the hole was full to overflowing. The water extended out over the floor of the alcove to the depth of about an inch. The plaintiff discovered the fact that there was water upon the floor, and walked through it for several feet, but did not know the conditions that caused it, nor that there was any hole in the floor. The negligence charged against the defendant is that it failed to furnish the plaintiff with a safe place to work, and failed to warn him of the existence of such hole and of the danger involved thereby in his approach to the tank.

I. The defendant contends that a verdict should have been directed in its favor on the ground that the plaintiff

was acting outside of the scope of his duties, and that he was a mere volunteer in the act which he was about to perform, in that it was no part of his duty to examine the elevator tank, and in that it was the personal duty of the night engineer to do that particular work. Whether this particular work was within the scope of the duty of the plaintiff was purely a question of fact upon this record. In the discussion of this question, appellant has quite ignored some of the testimony of the plaintiff. The argument is based upon the assumption that the sole duty of the plaintiff was to wheel in coal and to wheel out ashes, and that the place of his duty was in and about the boiler room only. The plaintiff testified, however, that, when the chief engineer employed him, he told him that he was to "help the engineer," and, "if the engineer wanted anything done, to let the ashes go." It appears also that during the eleven days of his work the night engineer did on different occasions direct him to other work than the mere wheeling of coal and ashes. Upon this state of evidence, the question of the scope of employment was clearly a question for the jury.

II. Appellant also contends that a verdict should have been directed in its favor because the plaintiff was guilty of contributory negligence as a matter of law. The plaintiff was told by Hannan that the place was dark and was directed to take matches with him, which he did. He testified that he was told to take the matches for the purpose of lighting the tank and ascertaining the height of the water. He did not light any of the matches. It is contended that this fact is fatal to his case. There are several reasons why this can not be so. It does not appear that a lighting of the matches would have disclosed the presence of the hole into which he fell. On the contrary, it appears quite conclusively that it would not have done so because the water

1. MASTER AND  
SERVANT: in-  
jury to ser-  
vant: scope of  
employment:  
evidence.

2. SAME:  
contributory  
negligence:  
evidence.

had overflowed the hole, and had extended out above it in such a way as to conceal it. The distance from the lighted alley to the tank was very short, and, as we understand the record, the tank itself was in the view of the plaintiff as he approached it. He might well have been required to discover obstructions, if any, in his way, but there were none. To say as a matter of law that he should have discovered a hidden pitfall is quite a different question. We think that the circumstances were such that the question of contributory negligence was for the jury.

III. The court gave to the jury instructions five and six as follows:

(5) If you find from the evidence that the night engineer, Hannan, was given by the defendant authority to hire and discharge men, to direct what work they should do, and where and how they should work, then the acts of said Hannan for and on behalf of the defendant, if proven, would be the acts of the defendant. But if you fail to find that said Hannan was given authority by defendant to hire and discharge men, or to direct them what to do and where and how to work, then the acts of said Hannan would not be binding upon the defendant. In considering this feature of the case, you will take into consideration what general work the plaintiff was required to perform, and what work he had performed previous to the injury, what was said to plaintiff at the time of his employment, if anything, in respect to his work, and all other facts and circumstances as disclosed by the evidence bearing upon this question.

(6) If you find from the evidence that the plaintiff was employed by defendant for certain work in the boiler room, and that the night engineer, Hannan, had no authority to put him at other work or put him at work at other places than said boiler room, then the act of said Hannan in sending plaintiff to the tank in question near which plaintiff was injured would not be the act of the defendant and defendant in that case would not be liable for any injury to plaintiff. But, on the other hand, if you find, as heretofore instructed, that the night engineer,

Hannan, was the agent of the defendant, and had the right and authority to direct the plaintiff where to work, and what to do, then his act in sending plaintiff to the tank in question was the act of the defendant.

Particular complaint is made of instruction five because it made the question of the authority of Hannan to hire and discharge men, the criterion of his alleged vice principalship. It is undoubtedly true that "authority to hire and discharge men" is not of itself a criterion of vice principalship, but it is always a proper circumstance as bearing upon that question. Instruction six fully covered the case at this point as made upon the record, and instruction five might well have been omitted. The real question at this point was whether the plaintiff was acting within the scope of his own duty when he obeyed the order of the night engineer, Hannan. If so, it was enough for the purpose of his case, regardless of the question whether Hannan was a vice principal in the ordinary acceptance of the term. If in obeying Hannan's orders plaintiff was acting within the scope of the terms of his own employment, he was entitled to a safe place to work, and to a warning of hidden dangers which were known to his employer. These were masterial duties, and remained such by whomsoever undertaken and by whomsoever neglected. Instruction five required plaintiff to show that Hannan had authority not only to "hire and discharge men," but also to "direct what work they should do, and where and how they should work." As already indicated, we think it was sufficient for the plaintiff to show that Hannan had authority to direct what work the plaintiff should do and where and how he should work. The instruction, therefore, was erroneous only in the sense that it laid upon plaintiff an undue burden, and it furnished no ground of complaint to the defendant.

Appellant complains of instruction six in that it is inconsistent with instruction five. It is not claimed that

3. SAME: vice  
principal:  
instructions.

instruction six is erroneous in any other respect. It is inconsistent with instruction five, in that it

4. SAME. states correctly the rule of law applicable to the case, whereas instruction five laid an undue burden upon the plaintiff as already indicated. Inasmuch as instruction five was not prejudicial, it necessarily follows that the inconsistency between it and a correct instruction is not prejudicial.

IV. Complaint is made that the court permitted the jury to allow damages for future suffering and future loss of time. It is said that there was no basis for such an

5. SAME: damages: future pain and suffering. instruction either in the pleadings or in the evidence. The petition did set forth the

injuries of the plaintiff including pain and suffering and loss of time. It is also alleged that such injuries were permanent. The medical testimony as to future disability is not definite nor very persuasive. It does, however, tend to show that there is a probability of future varicose ulcerations on the plaintiff's leg, and that this probability would increase with age, and this was proper matter for the consideration of the jury. We think it must be said that both the petition and the evidence were sufficient to justify the instruction. *Evans v. Elwood*, 123 Iowa, 92.

V. It is urged that the verdict is excessive. It was for \$2,000. The plaintiff was confined in the hospital for eight weeks, and suffered much pain during his treatment

6. SAME: excessive verdict. there. The present physical signs of his injuries consist only of an extensive scar on

his ankle, and the calf of his leg. As we read the printed testimony, the verdict impresses us as large. If the trial court had interfered with it, we could approve such action upon the printed record. But the trial court thought otherwise, and we do not feel justified in overruling its judgment in that respect. We are confined here to the printed record, whereas the trial court had an opportunity

to see the apparent state of the injury at the time of the trial by an exhibit of the person.

VI. Plaintiff filed a motion to dismiss the appeal for want of proper exceptions to the judgment and to the order overruling the motion for a new trial. Pending the appeal there was a correction of the record in the court below, and much of the printed matter here has been devoted to that question. The motion to dismiss was ordered to be submitted with the case. We think the motion to dismiss should be overruled. In view of the conclusion reached upon the merits of the appeal, we do not care to enter into a discussion. The judgment below is *affirmed*.

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FREDERICK M. HUBBELL, ET AL., Appellees, v. LAFAYETTE HIGGINS, Appellant.

**Constitutional law:** HOTELS: ARBITRARY CLASSIFICATION: STATUTE.

- 1 The act of the 33d General Assembly providing for the inspection of hotels and declaring that every structure kept, used, advertised, or held out to the public to be an inn, hotel or public sleeping house, or place where sleeping accommodations are furnished for hire to transient guests, in which ten or more sleeping rooms are used for the accommodation of guests, shall be deemed a hotel within the meaning of the act, is not unconstitutional because making an arbitrary and unreasonable classification of hotels, in that it is confined in its application to hotels having a certain number of rooms, or that it refers simply to hotels which receive transient guests.

**Same:** DELEGATION OF LEGISLATIVE POWER. Nor is the statute uncon-

- 2 stitutional because delegating legislative power to a hotel inspector, provided for therein, in that it authorizes him to arbitrarily determine whether a hotel is of approved fire proof construction or maintained in approved sanitary condition; since the act does not confer upon him arbitrary power in these respects but simply requires him to determine in given cases whether hotels are in fact of such construction. And the same is true concerning his authority over sanitary matters and other like features of the act.

**Same:** HOTELS: SANITARY REGULATION: ENFORCEMENT. Nor does the

- 3 provision that all hotels shall be kept and maintained in a clean and sanitary condition, free from gas or offensive odors arising from designated sources, or from any other source, within the control of the owner or person in charge, operate to confer on the inspector arbitrary power to declare a nuisance because of offensive odors.

**Same:** DUE PROCESS OF LAW: SEARCH. The legislature in the exercise of its police power may provide for the inspection of hotels in the interest of public safety and health; and this right of inspection is a mere incident of such power, an exercise of which violates no constitutional guaranty against the right of entry upon private property and search without due process of law.

**Same:** IMPRISONMENT FOR DEBT. The provision of the statute in question which makes a failure to pay the inspector's charge a misdemeanor and punishable by fine and imprisonment is invalid, because in violation of the constitutional provision which prohibits imprisonment for debt. But as that provision is not essential to the remainder of the act it may be eliminated leaving the act in all other respects valid.

*Appeal from Polk District Court.*—HON. W. H. McHENRY,  
Judge.

THURSDAY, JUNE 16, 1910.

**ACTION** for injunction brought by the plaintiffs, as owners of a hotel, against the defendant, as the official hotel inspector, to restrain the defendant from enforcing against the plaintiffs the provisions of the law relating to hotel inspection, being chapter 168, Acts 33d General Assembly, on the alleged ground that such act is unconstitutional. There was a decree in the trial court sustaining the contention of the plaintiffs and entering a decree of perpetual injunction against the defendant on the ground of the unconstitutionality of such statute. The defendant appeals.—*Reversed.*

*H. W. Byers and George Cosson, for appellant,*

*W. E. Johnston and Baily & Stipp, for appellees.*



EVANS, J.—The case was tried below upon a stipulation of facts. The issues were so framed and the facts so stipulated as to present to the court the one question whether the act of the Thirty-Third General Assembly above referred to is constitutional. The specific grounds upon which plaintiffs challenge the validity of the act as being unconstitutional are set forth in their substituted petition as follows:

That said act is unconstitutional, and in violation of and repugnant to the provisions of the Constitutions of the United States and state of Iowa, for the reason that the classification of inns, hotels and public lodging houses to which the said act is made applicable is an arbitrary classification based on no valid or sufficient reason, for the reason that it is class legislation and not equal or uniform in its provisions. That it deprives the plaintiffs of equal protection of the law. That it abridges the privileges and immunities of the plaintiffs as citizens of the United States and of the state of Iowa. That it deprives plaintiffs of their property and liberty without due process of law. That it delegates legislative power to the inspector of hotels, for the reason that the regulations contained in said act are arbitrary and unreasonable. That section sixteen of said act is in violation of and repugnant to section nineteen of article one of the Constitution of the state of Iowa, in that it provides for imprisonment for debt and endeavors to make a misdemeanor out of an act which the Legislature has no power to define as a misdemeanor. That sections two and five of said act are in violation of and repugnant to section one of the fourteenth amendment of the Constitution of the United States and section six of article one of the Constitution of the state of Iowa, for the reason that said sections of said act create a monopoly and abridge the privileges and immunities of these plaintiffs and denies to these plaintiffs the equal protection of the law. That section six of said act is in violation of and repugnant to the Constitution of the United States and state of Iowa for the reason that it endeavors to make a nuisance out of things and conditions which are not nuisances in fact. That said act is void for the reason that its provisions are

so uncertain and indefinite as to be impossible of enforcement.

The argument of plaintiffs, appellees, is concentrated largely upon the propositions: (1) That the classification of hotels as made in such act is arbitrary and unreasonable; (2) that the act confers upon the hotel inspector legislative powers; (3) that it gives the inspector arbitrary power to declare a hotel a nuisance even though no nuisance exist in fact or law; (4) that it is void for uncertainty in its terms; (5) that it authorizes imprisonment for debt, in that a failure on the part of the hotel keeper to pay the inspection fee is made a misdemeanor thereby.

There are a few general rules applicable to the discussion which are well settled by the authorities and which are not controverted by the parties before us. As preliminary to the discussion, some of these rules may be stated in varying form as we cull them from the cases.

Legislation in favor of different classes of individuals, in order to be valid, must extend to and embrace equally all persons who are or may be in like circumstances, and the classification must be natural and reasonable, not arbitrary or capricious.

The true practical limitation of the legislative power to classify is that the classification must be upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity, or propriety of different legislation with respect to them.

Classification, to be constitutional, must be based upon substantial distinction which makes one class so different from another as to suggest the necessity of different legislation with respect to it.

Laws public in their objects may be confined to a

particular class of persons if they are general in their application to the cases to which they apply, provided the distinction is not arbitrary but rests upon some reason of public policy.

Classification must be reasonable and based upon real differences in the situation, conditions and tendencies of things. If there is no real difference between persons, occupations, or property, the state can not make one in favor of some persons over others.

The true practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggest the necessity or propriety of different legislation with respect to them. *State v. Garbroski*, 111 Iowa, 496; *Bailey v. People*, 190 Ill. 28 (60 N. E. 98, 54 L. R. A. 838, 83 Am. St. Rep. 116); *State v. Cooley*, 56 Minn. 540 (58 N. W. 150); *State v. Mitchell*, 97 Me. 66 (53 Atl. 887, 94 Am. St. Rep., 481); *Nichols v. Walter*, 37 Minn. 264 (33 N. W. 800).

Legislation which affects alike all persons similarly situated is not class legislation. *Sisson v. Board of Supervisors*, 128 Iowa, 462; *Barbier v. Connolly*, 113 U. S. 27 (5 Sup. Ct. 357, 28 L. Ed. 923); *Hayes v. Missouri*, 120 U. S. 68 (7 Sup. Ct. 350, 30 L. Ed. 578).

The legislature has power to adopt legislation in the interest of public health and public safety, provided such legislation is reasonably adapted to the end sought. The Legislature may also grant to commissioners and other subordinate officers power to ascertain and determine appropriate facts as a basis for procedure in the enforcement of the law, and the granting of such authority is not a delegation of legislative power. *Brady v. Mattern*, 125 Iowa, 169; *State v. Thompson*, 160 Mo. 333 (60 S. W. 1077, 54 L. R. A. 950, 83 Am. St. Rep. 468); *Ryan v.*

*Outagamie*, 80 Wis. 336 (50 N. W. 340); *Locke's Appeal*, 72 Pa. 491 (13 Am. Rep. 716); *Easton Commissioners v. Covey*, 74 Md. 262 (22 Atl. 266).

The first point argued by the appellees is that the statute is arbitrary in its classification, in that it is confined in its application to hotels having ten or more sleeping rooms. This classification is found in section one of the act, and it is in the nature of a definition of "hotel" within the meaning of the act, and is as follows: "Every building or structure kept, used, advertised as or held out to the public to be an inn, hotel or public lodging house, or place where sleeping accommodations are furnished for hire to transient guests whether with or without meals in which ten or more sleeping rooms are used for the accommodation of such guests shall for the purpose of this act be defined to be a hotel."

1. CONSTITUTIONAL LAW:  
hotels: arbitrary classification:  
statutes.

It is not denied but that some classification is desirable and proper, and that some line of division may be reasonably adopted as limiting the application of the law. Can it be said that the line of division which is provided in the statute is based upon a natural reason and one in harmony with the necessities of the situation? There is a sense, it is true, wherein the adoption of *ten* as the minimum number is arbitrary; that is to say, the Legislature might as reasonably have adopted the number *nine* or the number *eleven* or even a larger or a smaller number. But this fact does not render the act arbitrary in a legal sense. It was essential to the practicability of the enactment that some fixed limitation be provided. Such limitation must be based upon a natural rather than an arbitrary reason. If the limitation adopted was a natural and reasonable one, it would be none the less so because some other limitation could have been adopted in lieu thereof.

It seems quite clear to us that the limitation adopted in this act was natural and reasonable and was in harmony

with the necessity of the situation. This provision of the act is manifestly based upon the assumption that the peril to the life and safety of guests is somewhat proportionate to the size of the hotel. We can not say that this is an unreasonable assumption. On the contrary, it impresses us otherwise. If a fire were to obtain in a hotel containing a thousand rooms occupied by guests, surely the problem of rescue confronting the public authorities in such case would be immensely more difficult than would be that presented by a like situation in a building containing only a few rooms and guests.

It is urged that it would have been more reasonable to have defined the limitation by stating the number of guests, rather than the number of rooms. If the act had adopted that method, it could have been attacked quite as persuasively with the suggestion that the number of rooms should be the criterion and not the number of guests. It seems clear to us that the number of rooms furnishes the more reasonable criterion because conditions are provided which must be complied with by the hotel keeper before he is permitted to receive guests at all. It is argued that ten sleeping rooms might mean ten guests or twenty guests or any larger number, according to circumstances. This, of course, is true as a possibility. The fact remains, however, that the number of sleeping rooms contained in a hotel does sustain a mathematical relation to the number of guests which it may accommodate. No criterion could have been adopted which was not capable of exceptional possibilities. The classification here complained of is one which has been adopted in many other states, notably Massachusetts, Minnesota, Missouri, Indiana and South Dakota, and it does not appear ever to have been condemned by any of the courts of those states.

It is also argued that this section is arbitrary because it is confined to those hotels which receive transient guests. It will be noted that this is simply a part of the definition

of a "hotel" within the meaning of the act. We can hardly conceive a hotel, as the term is ordinarily used, which does not receive transient guests. This is a distinctive feature of a hotel as commonly understood, regardless of the statutory definition. It is said, however, that a hotel might confine itself to permanent guests or boarders, and that in such case the statute would not be applicable, and that the act is therefore discriminatory. This is a strained argument. But granting the possibility of a hotel which confined its trade to permanent guests only, and received no transient guests, the classification even then would not be unnatural nor unreasonable. Surely permanent boarders have a better opportunity to acquaint themselves with their surroundings and with the opportunities and conveniences of escape in case of danger, and have better opportunities for making provision for their own safety, than would a transient guest, who comes as a stranger, and who enters his room without any knowledge of its surroundings, or of the most practicable methods of escape in case of an emergency.

II. It is next argued that the act in question confers upon the hotel inspector legislative powers. This contention is based upon certain general provisions contained in the statute which call for the exercise of judgment on the part of the hotel inspector.

2. SAME:  
delegation of  
legislative  
power.

By its terms such act is not applicable to hotels of "approved fireproof construction." It is argued that this expression is not known to the trade, and therefore that it can mean nothing except that the hotel inspector may arbitrarily approve or disapprove a given hotel as being of "fireproof construction" or otherwise. The act also provides that "approved sanitary conditions" shall be maintained, and that cesspools and privies shall be properly cleaned and disinfected as often as necessary to maintain them in such sanitary condition. It is argued that the inspector may arbitrarily determine whether a hotel is thus maintained in a sanitary condition or not, and that the

statute contains no definition which will protect the hotel keeper against such arbitrary conduct. Other analogous provisions of the act are presented to our attention which provide opportunities, as is claimed, to the inspector to act arbitrarily and oppressively. It may be noted first that these very provisions which are thus arrayed as fatal defects in the law were manifestly intended to give the law flexibility and to make it less technical and less onerous to the hotel keeper. The ultimate purpose and final object of the law is clearly set forth. This object may be attained by the hotel keeper by the specific methods pointed out in the statute, or by such other methods as the hotel keeper may choose, provided he attain the result. The fallacy in the argument at this point is the assumption that the hotel inspector may arbitrarily, in a given case, find the facts to be otherwise than as they truly are. The inspector is himself amenable to the law and can proceed only under the law and in accordance with the facts as they shall be. The power of the inspector in such a case has been set forth by the Supreme Court of Massachusetts in this wise: "The power to make rules and regulations in the nature of subsidiary legislation may be delegated by the Legislature to a local board or commission; such rules being subject to be tested in the courts to determine whether they reasonably are directed to the accomplishment of the lawful purpose of the statute under which they were made." *Welch v. Swasey*, 193 Mass. 364 (79 N. E. 745, 118 Am. St. Rep. 523, 23 L. R. A. (N. S.) 1160).

The act under consideration does not purport to confer upon the inspector any arbitrary power. It does require him to determine in given cases whether a hotel is of "fireproof construction." If "yea," it is an approved fireproof construction within the meaning of the statute. If "nay," then otherwise. But this would not empower the inspector to say arbitrarily that a given hotel was not of "fireproof construction" when in truth it was of such fireproof con-

struction. Nor have we any doubt but that such an attempted act on the part of the inspector could be called in question by any aggrieved party by proper action in court. And the same may be said concerning the other analogous features of the act which we have already referred to.

III. It is urged by appellee that arbitrary power is conferred upon the inspector to declare a nuisance solely because of "offensive odors." It is argued that this reduced

3. SAME: hotels: sanitary regulation: enforcement. the question of whether a hotel is maintaining a nuisance to the condition of the official olfactories, and that, if the odor of onions should prove "offensive" to a hotel inspector, then a nuisance is created under the statute. The provision of the act which is thus criticised is as follows: "All hotels shall be kept and maintained in a clean and sanitary condition and free from any effluvia, gas or offensive odors arising from any sewer, drain, privy or *any other source whatever* within the control of the owner, manager, agent or person in charge thereof." The argument of appellee has quite ignored the qualifying provision which we have italicized. The odors referred to therein are clearly such as would create a nuisance under the law quite independent of this particular act. Under well-established rules of construction of statutes, the words "any other source whatever" have reference to a source of like kind with "sewer, drain, and privy."

IV. It is also argued that the act is void because it gives to the inspector the right of entry upon private property and the right of search without due process of law.

4. SAME: due process of law: search. The only right given under the act is such as is necessarily incident to all power of inspection. This complaint has special reference to section fifteen which provides as follows: "It shall be the duty of the inspector upon ascertaining, by inspection or otherwise, that any hotel is being carried on contrary to any of the provisions of this act to notify the manager, proprietor or owner in writing in what respect it fails to



comply with the law, and requiring such person within a reasonable time, to be fixed by the inspector, to do or cause to be done the things necessary to make it comply with the law." The power of the Legislature to provide for inspection of premises in the interest of public safety and the public health is so well established that we will not enter upon a discussion of it. The right of inspection is incidental to the police power, and counsel cite no case wherein it was ever held that the exercise of such power violates any constitutional right of the citizen.

V. Section sixteen of the act provides as follows: "Any owner, manager, agent or person in charge of a hotel who shall obstruct, hinder or interfere with an inspector or his deputy in the proper discharge of his

5. SAME:  
imprisonment  
for debt.

duty, or who shall willfully fail or neglect to comply with any of the provisions of this act, or who shall fail to pay the proper fee for inspection shall be guilty of a misdemeanor and upon conviction thereof, be fined not exceeding one hundred (\$100.00) dollars or imprisonment in the county jail not exceeding thirty days." It is said that under this section a mere failure on the part of the hotel keeper to pay the inspection fee is made a misdemeanor, and that this is so, even though he comply with every other requisite of the law, and that the effect of such provision is to subject the hotel keeper to imprisonment for failure to pay a debt. We think this contention must be sustained. That is to say, that part of section sixteen which makes a mere failure to pay the inspection fee a misdemeanor punishable by fine and imprisonment is clearly unconstitutional as being a violation of section 19, article 1, of the Constitution of this state, which forbids imprisonment for a debt. See *Chauvin v. Valiton*, 8 Mont. 451 (20 Pac. 658, 3 L. R. A. 194). It is also clear to us, however, that this provision is not essential to the integrity of the act as a whole, and that its elimination does not carry down with it the rest of the enactment. We do

not find that the act under consideration in any other respect contravenes any provision of the Constitution either of Iowa or of the United States. It is well settled that the courts will not declare unconstitutional an enactment of the Legislature unless it is clearly and palpably so. The power of the courts to nullify the act of a co-ordinate branch of the government is one of grave importance. Its exercise has always been recognized by all the departments of government as essential to the well-being of the body politic. But the power is one which the courts exercise with great caution and with the highest regard for the prerogatives of the legislative department. With the wisdom or the advisability of the legislation, the courts have nothing to do. That question must be argued before the legislative tribunal. Its power of amendment or repeal is coextensive with its power of enactment.

For the reasons indicated, the decree entered below must be *reversed*.

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FREDERICK M. HAWK AND OTHERS, Appellants, v. GEORGE S. DAY AND OTHERS, Appellees.

**Judgments:** PRESUMPTION OF REGULARITY: WANT OF NOTICE: EVIDENCE.

- 1 A judgment entered without notice or consent of defendant is void and may be directly or collaterally attacked whenever any right based thereon is asserted; but when entered by a court of general jurisdiction a presumption exists in favor of notice or acquiescence therein which can not be overcome except by clear and satisfactory evidence, and mere failure of the record to show service of notice or return thereof, or appearance and consent to judgment will not overcome the presumption in favor of its regularity. This rule, however, does not obtain in cases dependent upon notice by publication or other form of constructive service, or in proceedings where the court exercises purely statutory powers.

**Partition:** TAXATION OF ATTORNEY'S FEES. Where the title to property

- 2 involved in a partition action is put in issue and each of the parties have employed counsel of their own choosing, attorney's

fees are not taxable as a part of the costs in favor of plaintiff's attorney.

**Same:** SUBSTITUTION OF ACTIONS. Where a pending suit in partition  
3 involves the entire subject matter and all persons entitled to a share in the property have been made parties, so that a decree entered therein will effectually settle and adjudicate the shares and interests of all concerned, it should not be displaced by a subsequent action brought to accomplish the same purpose.

**Appeal:** TAXATION OF COSTS. Where the record on appeal contains  
4 a large amount of printed matter which could have been materially condensed, the cost of printing will be taxed on the latter basis.

*Appeal from Keokuk District Court.*—HON. K. E.  
WILLCOCKSON, Judge.

THURSDAY, JUNE 16, 1910.

THE opinion states the case. Reversed.

*C. M. Brown and F. L. Goeldner*, for appellants.

*Talley & Hamilton, H. F. Wagner and H. F. Goeldner*, for appellees.

WEAVER, J.—Leah Hawk, Mary Ann Hawk, and Rebecca F. Hawk were sisters and owners in common of a tract of land in Keokuk County on which they lived in a common home. On December 7, 1898, Leah Hawk died testate. By the terms of her will she gave her one-third interest in the land, describing it, to her surviving sisters, also her personal property, "to hold and use during their natural lives and what remains at their death to go to Robert W. Hawk's children, each sharing equal." Robert W. Hawk was the son of the testatrix. The punctuation was such as to cast doubt upon its proper construction, and the surviving sisters, or at least one of them, raised the question whether the effect of the devise was not to give them a fee in the real

estate of which the testatrix died seised. After the will had been probated, Mary A. Hawk instituted a proceeding to construe this provision of the will. The petition was filed August 30, 1899. It named Mary Ann Hawk as plaintiff and Rebecca F. Hawk, Robert W. Hawk, and Frederick, Hugh, Lulu, and Edward Hawk, children of Robert W. Hawk, as defendants. This proceeding appears to have been pending in court from the date last mentioned until March 9, 1900, when a decree was entered of record finding and declaring that, "under the will of Leah Hawk, Mary Ann Hawk and Rebecca Hawk take a life estate only in the real estate in said will described, and that after their death the same goes to the children of Robert Hawk." Thereafter the said sisters Mary Ann and Rebecca continued to live upon the land enjoying its use, rents, and profits until March, 1904, when Rebecca died, leaving a will which has been duly probated, by the terms of which she specifically devised to George S. Day her "one-third interest and title" to the real estate, describing it. In March, 1908, Mary Ann Hawk died without will, leaving as her heir a daughter, Cyrilda Hawk. In November of the same year Frederick W. Hawk and other children of Robert began an action for the partition of the land, alleging that the title thereto was vested as follows: One-third thereof in the children of Robert under the will of Leah Hawk; one-third in George S. Day under the will of Rebecca; and the remaining one-third in Cyrilda as the heir of Mary Ann. To this proceeding the said George S. Day, Cyrilda Hawk, and a minor son of Robert were made defendants. The petition recited in substance the facts above stated, except that no reference was made to the proceedings to construe the will of Leah Hawk or to the decree rendered therein, a record which appears to have been lost sight of and the existence of which was unknown to plaintiffs' counsel, who had no connection with the case prior to the commencement of partition proceedings. To this petition a general demurrer was

filed, and the court announced its ruling sustaining the same, whereupon plaintiffs signified their election to stand upon their pleading without further amendment, and the court entered upon its desk calendar a memorandum for judgment against plaintiff for costs under date of December 23, 1908. Within a few days after this entry plaintiff's counsel discovered the record of the proceedings for the construction of the will, and on January 8, 1909, gave notice to the defendants of the filing of a petition to reopen the case. The petition was filed January 14, 1909, setting up the newly discovered record, excusing the failure to sooner present it, and asking that the case be reopened and plaintiffs allowed to amend their petition and plead the adjudication had in the proceedings to construe the will. This application, though strenuously resisted by the defendants, was sustained on February 20, 1909.

To explain the manner in which the position of the parties plaintiff and defendant appears to be reversed in the title to the cause as it comes up on appeal, it should here be stated that on December 31, 1908, after the ruling sustaining the demurrer to plaintiff's petition and dismissing their action had been announced, but before it had been entered of record and before the final adjournment of the term, Cyrilda Hawk and George S. Day instituted another action for the partition of the same property, naming Robert W. Hawk and a large number of other persons defendants. The children of said Robert were not made defendants therein, but came into the action by intervention and moved to dismiss the same, inasmuch as the subject-matter thereof was already before the court, and, in the event that such motion was denied, asked that such new action be consolidated with the first which had then been reopened and was awaiting trial. After considerable sparring, it was stipulated that said motions should be submitted to be decided in the final decree, and that the evidence on all the issues should be taken in a single hearing. Trial was then

had and decree entered to the effect that the decree in the proceeding for the construction of the will of Leah Hawk was an adjudication binding and concluding Mary Ann Hawk, who was the plaintiff therein, and upon all parties claiming through and under her, but that Rebecca F. Hawk was not thereby concluded, and as to her and those rightfully claiming through or under her the will of Leah should be held and construed as passing to them the fee to one-half of the said Leah's interest in the land; but it was further held that, Rebecca having failed to dispose of such interest by the terms of her will, it should be treated as intestate property and distributed to her heirs at law. It was ordered further that the motion of the original plaintiffs to dismiss the action last instituted for partition be overruled, that the demand for consolidation be denied, and that the maximum statutory attorney's fee be taxed in favor of plaintiffs in the action last begun. From this decree and the rulings above mentioned, the children of Robert Hawk, claiming title to all of that part of the land of which their grandmother, Leah, died seised, have appealed.

Notwithstanding the maze in which this controversy has become involved, rendering anything like a complete statement thereof very difficult, the essential propositions to be considered are quite simple. The ultimate question upon this appeal is the extent of the interest of the children of Robert Hawk in the land of which their grandmother, Leah Hawk, died seised. Her interest or share in the land was an undivided one-third, and, if the decree construing the will is to be held valid and conclusive as against all parties therein named, then their contention is right, and the entire fee of said share passed to the appellants subject only to the life estate of Mary A. Hawk and Rebecca F. Hawk, both of whom have since deceased. If, however, the decree did not conclude Rebecca F. Hawk, as was held by the trial court, then the right of appellants to more than was confirmed to them by the decree in this case depends on the

proper construction of the will as it may be determined by the court.

I. If the decree construing the will is to be held effective as to all parties therein named, discussion of most of the other matter treated in the argument of counsel will be

rendered unnecessary, and we therefore give it first consideration. While questioning the legal correctness of the construction put upon the will in said decree, counsel for appellee

I. JUDGMENTS:  
presumption  
of regularity:  
want of notice:  
evidence.

concede that, no appeal having been taken therefrom, it operates as an adjudication against Mary Ann Hawk and all persons claiming under or through her; but they deny such effect as to Rebecca F. Hawk and her heirs on the alleged ground that while she was named as a party to said proceeding, and her name is included in the decree, she was not in fact served with notice and did not appear therein nor consent to be bound thereby. In other words, it is claimed by the appellees that as to Rebecca F. Hawk the decree construing the will is void for want of jurisdiction of her person. In the nature of things, Rebecca being dead, no one is able to say, and no one testifies as a matter of knowledge, that notice was not served upon her, or that she did not in some manner appear in said proceedings or consent thereto. But it is shown that upon search of the files in the case no such notice or proof of service upon her is found therein. It is further shown that there is no entry or memorandum upon the appearance docket of any return of such service and no entry of any appearance in her behalf. On these facts alone it is contended by the appellees, and the trial court evidently so held, that the presumption in favor of the decree is overcome, and that as to Rebecca F. Hawk and her heirs it is void.

Under the rule obtaining in this state, there can be no serious question but that a judgment or decree obtained wholly without notice or consent of any kind is void, and its validity may be attacked directly or collaterally wherever

any right based thereon is asserted. But it is no less firmly established that the judgment of a court of general jurisdiction is supported by a strong presumption of the existence of every essential jurisdictional fact, and that such presumption must prevail until overcome by clear and satisfactory evidence. It is not enough for that purpose to simply raise a doubt and show the possibility that no notice was ever given. This is particularly true where the attack upon the judgment is of a collateral character. The rule is stated in 23 Cyc. 1078 as follows: "In the case of a judgment rendered by a domestic court of general jurisdiction which is attacked in a collateral proceeding, there is a presumption, which can only be overcome by positive proof, that it had jurisdiction both of the person and of the subject-matter and proceeded in the due exercise of that jurisdiction. . . . It will be presumed, unless expressly contrary to what is shown by the record, that legal and proper process was issued in the action, and that it was duly and regularly served upon the defendants." The accepted rule appears to be that it is not enough to show that a present search of the record discloses no affirmative statement or showing of the service of summons or notice. In other words, in an attack upon the validity of a judgment, absence of a record of a jurisdictional fact is not of itself sufficient to overcome the presumption of the existence of such fact. If the party affected by the judgment be living and testifies clearly in denial of such service, and he is a creditable witness, absence of any record thereof is a very important and ordinarily a decisive circumstance.

But where, as in the case at bar, the only basis of attack is the failure of the record to affirmatively show service or appearance, no authority or precedent called to our attention goes to the length of holding such showing sufficient to neutralize the presumption of regularity which attaches to the judgment. The only apparent exception to this general rule is in cases dependent upon notice by publication or



other form of constructive service, and in proceedings in which the court is called upon to exercise powers which are purely statutory. In such cases it has been held that to sustain a judgment the record must itself disclose facts affirmatively indicating the several steps by which jurisdiction has been acquired. That the general rule is otherwise has been too often recognized to permit anything like an exhaustive reference to the authorities; but the following fairly represent the views of all the courts. In *Wright v. Marsh*, 2 G. Greene, 94, it is said that collateral objection to a judgment "can never prove availing especially when applied to a record from a court of general jurisdiction in which power and jurisdiction will be presumed until the contrary clearly appears. . . . We regard it as well settled that want of jurisdiction will not be presumed in a court of general authority, and, where the record from such a court is silent or does not aver all the facts necessary to show that jurisdiction was properly exercised, it will still be presumed that the court legally acquired power over the subject-matter and over the parties." That rule is reaffirmed in even stronger terms in *Boker v. Chapline*, 12 Iowa, 206. See, also, *Hunger v. Barlow*, 39 Iowa, 541. To the same effect, see *Brown on Jurisdiction*, section 20a. In a note to the foregoing it is said: "Hence though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed on collateral attack that the court, if of general jurisdiction, has acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared." See, also, *Gas Co. v. Wheelock*, 80 N. Y. 278; *Benefield v. Albert*, 132 Ill. 665 (24 N. E. 634); *Swearengen v. Gulick*, 67 Ill. 208; *Nickrans v. Wilk*, 161 Ill. 76 (43 N. E. 741); *Merz v. Mehner* (Wash.) 106 Pac. 1118; 17 Am. & Eng. Ency. Law (2d Ed.) 1073-1075; 23 Cyc. 1079.

As we have already indicated, it was open to appellees

to plead and prove want of jurisdiction in the court to render the decree construing the will by an affirmative showing that no notice of the proceeding was served upon Rebecca F. Hawk, and that she was not in any other manner brought within the jurisdiction of the court in that proceeding. They have entered such plea, but the evidence offered is not that no service or notice was ever made, but that the record does not affirmatively show proof of service, which is a very different matter. The absence of record of service or other fact bringing the party within jurisdiction of the court entering judgment against him is the very thing which arouses the presumption of which we have spoken. If the fact or method or manner of service or appearance were found in the record, there would be no room for presumption, and it would be an absurdity to hold that the presumption may be overcome by pointing to the very omission which calls it into play. Service of process or notice upon an adverse party or an appearance by him is the primary inquiry, the very first thing a court is called upon to consider before entering judgment or decree affecting the rights of such party, and it will be presumed that, before attempting to pass judgment thereon, the court satisfied itself that by service, appearance, or otherwise jurisdiction to render it had been obtained. As the appellees have produced no evidence to rebut the presumption which the law supplies in support of the decree construing the will, we need not enter upon the further inquiry whether the relations of Rebecca to the case and the circumstances surrounding it were not sufficient to uphold a finding that she knew of the proceedings and consented thereto in a manner to make the decree *res adjudicata* as to her even in the absence of service of original notice.

Holding then, as we do, that the presumption in favor of the decree must prevail, it is unnecessary for us to consider or pass upon the construction of the will as an original proposition. It has been judicially construed, the presumed

regularity of the proceeding has not been overcome, and the decree as so entered must be observed and effectuated in a partition of the land.

II. Counsel have devoted considerable attention to the ruling of the trial court refusing to consolidate the two actions brought to partition the land and dismissing the one brought by the appellants. The facts seem to be that when the court sustained the demurrer to the petition in the action brought by appellants, and they elected to stand on their pleading, the court made the usual memorandum for a judgment upon its desk calendar, and before it had been entered or written up by the clerk, and before the adjournment of the term, the appellees, or some of them, began another action of the same nature and had served notice upon some of the parties named as defendants before appellants discovered the existence of the decree construing the will, and secured the setting aside of the ruling upon the demurrer. Appellees then resisted a consolidation of the two proceedings and proceeded to complete the service of original notice in their own action. The trial court seems to have held with the appellees that the action last instituted should be accorded the right of way, and the final decree was entered therein. It is somewhat difficult to suggest any good reason for the strife over the precedence between the two proceedings. Some things said in argument give color to the thought that the real apple of discord upon this feature of the case is the attorney's fee which is provided for in Code, section 4261. If so, counsel seem to have overlooked the fact that, where the title of property involved in partition proceedings is put in issue, and all parties are represented by counsel, neither may have attorney's fees taxed at the expense of the common property. *McClain v. McClain*, 52 Iowa, 272; *Duncan v. Duncan*, 63 Iowa, 150; *Everett v. Croskrey*, 101 Iowa, 17; *Finch v. Garrett*, 102 Iowa, 388; *Beeman v. Kitzman*, 124 Iowa, 86.

2. PARTITION:  
taxation of  
attorney's fees.

Prior to the enactment of this statute the courts of this state had quite generally adopted the practice of allowing attorney fees in partition cases where no contest was made, and chapter 184 of the Acts of the Twentieth General Assembly recognized and regulated such practice by fixing a maximum scale of charges. In carrying this provision into the Code (section 4261), attorney's fees for the plaintiff are provided to be taxed as costs; but the words "where no defense is made" were omitted from the sections, and, if we were to look to this provision alone, there would be colorable support for the claim that such fees should be allowed in any event. But in this same connection we find that by section 4260 "costs created by contest" of such proceedings are not taxable against the common fund. Attorney's fees, when taxable at all, are part of the costs and come within the limitation thus fixed. We regard it clear that, where the title to the property is put in issue, the Legislature did not intend to impose the burden of paying any part of plaintiff's attorney's fees upon the opposing parties who are represented by counsel of their own choosing. The only justification for the practice of assessing such fees is in the fact that in a very large proportion of partition cases there is no contest over proportionate shares, and the proceedings are amicable in character because they afford in many instances the easiest and most expeditious method of segregating the interests of tenants in common, and the attorney who institutes the action is serving the defendants as well as the plaintiffs. Under such conditions it is entirely equitable to provide that the shares of all parties be made to contribute proportionately to the expense thus incurred for the common benefit. But where the title or right of a party to share in the property is wholly denied, or his share, if any, is made a matter of dispute, and each employs the service of counsel, it would be signally unjust to require such contribution. In the case at bar, for instance, the plaintiffs in the proceedings last

begun denied the appellants' right to any part or share in the land, and compelled them to employ counsel in their own behalf to defend their rights in the courts to a successful conclusion, establishing and confirming the shares as claimed by them, and it hardly needs saying that, in the absence of a statute clearly requiring it, equity will not impose upon them the burden of paying counsel for services rendered to the opposing party in an unsuccessful attempt to defeat their title. The result of this decision is to give to the appellants the very share and interest which they claimed in the property at the outset of this litigation, and no part of the taxable costs since accruing by reason of the contest so made should be taxed to them or charged upon their shares in the land.

We are of the opinion that, the ruling upon the demurrer to the original petition having been set aside and the case reopened for trial, the court should not have displaced it in favor of the later action. It is sought to justify this ruling under the precedent afforded by *Guinn v. Elliott*, 123 Iowa, 179, and because it is said that plaintiffs in the original case had not made defendants of all parties entitled to share in the land, and that such omission was corrected in the action begun by appellees. If the reason stated be sound, it demonstrates the error of the ruling. All parties whom we find entitled to share in the partition were in fact made parties to the action as originally brought, while of the numerous additional parties brought into the second proceeding none is found having any interest in the subject-matter. Moreover, in that action appellees failed to make parties of these appellants whom we find entitled to one-third of the land. The subject-matter of the action was before the court, and all persons entitled to share in the property had been made parties to the proceeding, and a decree entered therein could have been made effective to settle and adjudicate the shares and interests of all con-

3. SAME:  
substitution  
of actions.

cerned. The bringing of a second action and its displacement of the one already pending served to confuse the record, prolong the litigation, and increase the costs without any corresponding advantage to any one. We are therefore of the opinion that so much of the costs as have been made by reason of the second action should be taxed against the plaintiffs therein, and that appellant's one-third share in the land be charged with no share of the costs of the litigation, except such as would have been necessary and proper had no contest been made. No attorney's fees can be taxed in favor of either party.

III. We cannot pass unnoticed the manner in which this appeal has been presented. The abstracts are striking examples of burdensome fullness and unnecessary repetition.

4. **APPEAL:**  
**taxation of**  
**costs.** They contain all the pleadings in both cases, together with motions, demurrer, affidavits, exhibits, and documents copied *in extenso*, including captions, signatures of counsel, and verifications; the records in the action for the construction of the will, including petition, answers, affidavits, and decree, set out with the same painful literalness no less than four several times, the will of Leah Hawk is seven times repeated, and the decree constructing the will seven times. In other respects the showing is unduly voluminous to an almost equal degree. We are not disposed to tax such clearly unnecessary costs in favor of parties making them. The material matters contained in the appellant's abstracts aggregating 141 printed pages could well have been condensed into a clear and comprehensive statement of 50 pages or less, and the costs of printing such abstracts will therefore be taxed on the basis of the latter figure.

For reasons hereinbefore stated, the decree of the district court is reversed, and cause remanded for further proceedings in harmony with this opinion. *Reversed.*

In the Matter of the Estate of LOUISA C. CRAWFORD,  
Deceased.

**Collateral inheritance tax:** CHARITABLE BEQUESTS: EXEMPTION: APPOINTMENT OF TRUSTEE. [A bequest to a religious or charitable society incorporated under the laws of a foreign state, with power to expend the bequest wherever the society may see fit, is not exempt from the collateral inheritance tax: But when made to a local branch of such a society, as the Salvation Army, and to be expended within this state, the exemption applies, although the society may be incorporated elsewhere.

And the trust will not be allowed to fail though the trustee named has no legal existence; as the court in such cases may appoint a trustee.

*Appeal from Des Moines District Court.*—HON. W. S. WITHROW, Judge.

THURSDAY, JUNE 16, 1910.

THE opinion states the case.—*Affirmed.*

*H. W. Byers*, Attorney-General, and *George Cosson*, Assistant Attorney-General, for appellant.

*Blake & Wilson*, for appellee.

WEAVER, J.—Louisa C. Crawford died testate May 13, 1908. Of the provisions of her will the only one requiring consideration upon this appeal is the following: Item 14: "At the death of my husband, George W. Crawford, and when our homestead situated at No. 605 South Garfield avenue, is sold it is my wish and I hereby direct that from the proceeds of same, the sum of \$2,000.00 shall be given to the Burlington, Iowa, branch of the Sal-

vation Army, for the following specific purposes: \$1,000.00 of said sum to be expended in the purchase of a permanent home or hall for said army, and the remaining \$1,000.00 to be paid said army and maintained as a fund to care for the sick or disabled members thereof." The will having been admitted to probate, the executor thereof filed a petition alleging that the paragraph above quoted was ambiguous and uncertain and asking a judicial construction of its terms with reference to the foregoing paragraph. Upon consideration of the matter thus presented, the court entered an order as follows: "It is ordered that the executor pay over to the Salvation Army, as provided in paragraph fourteen of the will of decedent, the sum of \$2,000 from the proceeds of the sale of the homestead; George W. Crawford, the husband, appearing by J. T. Illick, attorney, and consenting thereto, said sum to belong to the Burlington, Iowa, branch of said Salvation Army, \$1,000 thereof to be expended in the purchase of a permanent home or hall for said army, and the remaining \$1,000 to be paid said army to maintain a fund to care for sick and disabled members thereof belonging to said Burlington branch of said Salvation Army."

Thereafter, difference of opinion having arisen upon the liability of said estate or a portion thereof to the assessment of a collateral inheritance tax, the executor filed in said probate proceedings another petition, setting up said paragraph of the will and the construction placed thereon by the court, and after alleging that the Treasurer of the State claimed said legacy to be subject to the collateral inheritance tax, and that such liability was denied by the beneficiaries of the gift, asked the court to determine whether said sum or any part of it was subject to be so assessed. To this proceeding the Salvation Army appeared and answered alleging that it is a charitable and religious organization which, though incorporated in New York, is engaged in charitable and religious work in Bur-



lington, Iowa, for which purpose it has a branch located in said city and is entitled to accept and administer the trust created by the will in aid of charitable and religious work in Iowa and to so receive and administer said fund exempt from collateral inheritance taxation. On the part of the state it was contended that, the Salvation Army not being incorporated in the state of Iowa, the fund so bequeathed in aid of its work is properly taxable under the terms of the statute. The trial court held and adjudged the fund to be exempt from taxation, and the state appeals.

The statute in question (Code Supp., section 1467) exempts from the inheritance tax all gifts and bequests "to or for charitable, educational or religious societies or institutions including hospitals, public libraries and public art galleries open to the free use of the public not less than three days of each week, within this state," etc. Stated briefly, the claim of the State Treasurer is that the exemption does not apply to a gift or bequest for the benefit of a corporation not organized under the laws of this state, and that the bequest here in question is of that character. It must be admitted, we think, that a legacy to or for the Salvation Army or other religious or charitable institution organized under the corporation laws of another state is not exempted from the inheritance tax. Such seems to be the express language of the act itself, and such is the holding of courts in other jurisdictions where like questions have arisen. *In re Prime's Estate*, 136 N. Y. 347, (32 N. E. 1091, 18 L. R. A. 713); *Humphreys v. State*, 70 Ohio St. 67 (70 N. E. 957, 65 L. R. A. 776, 101 Am. St. Rep. 888); *People v. Society*, 87 Ill. 246. In none of these cases upon which appellant relies to sustain its contention in the case at bar has the court been called upon to say whether a gift or bequest in the nature of a trust to be expended within the state for purely local benefit and local purposes may be held exempt. In *Humphreys v. State*, *supra*, the court, in unholding the general rule and

applying it to the case there presented, is careful to say: "The will of Mrs. Brown, who was a resident of Cincinnati, gave no direction to her executor or her legatees as to the place where the money should be expended, nor does it undertake to control the time or place of its expenditure. Once in the possession of these institutions, it may be disbursed as they deem proper, and all of it may be disbursed in communities beyond our borders. So we do not feel that we are adopting a narrow construction of our statute, if it appears that it undertakes to tax the right of foreign, though charitable, institutions to receive and so absolutely control the disposition of property owned by the testatrix in this state."

If, as we are inclined to hold, the deduction here suggested is sound, the bequest made by Mrs. Crawford may in our judgment be fairly held to come within the exemption. The gift is not to or for the Salvation Army. That body is given no power or authority to take it out of the jurisdiction of the state or to expend it for any other than the local purposes mentioned in the will. The trustee named for this purpose is not the Salvation Army, but the Burlington, Iowa, branch thereof. Whether such local branch has a distinct organization with any independent or autonomous functions is not shown in the record; but this it not a material inquiry, for, if the gift be construed as intended to aid the work of a definite local charity, the fact that the trustee named in the will has no legal existence or is without power to accept or administer the trust is immaterial, for the court will not permit the trust to fail for want of a qualified trustee and will itself name one if it becomes necessary. The distinction between a gift made generally to or for a charitable society organized in another state, and a gift made to aid the work of a strictly local charity with which the foreign society may be associated, is not a violent one, and promotes the apparent intention of the Legislature to relieve from the burden of

this tax moneys and property kept within the jurisdiction of the state and devoted to the amelioration of the condition of its own people. In the city of Des Moines, for instance are two hospitals established and maintained each by a great religious organization. If now it should happen that the churches, who are the organizers and promoters of these great charitable enterprises, and whose work in various lines is nation wide in its scope, should for business purposes incorporate themselves or some central board of trustees or other officers in the state of New York, would that fact be sufficient to charge an inheritance tax upon a gift by a resident of the state made for the specific purpose of erecting an addition to one of these hospital buildings or to endow additional beds for the use of the needy patients? To so hold would, we think, be an exceedingly narrow construction and involve a sacrifice of the real spirit and intent of the statute. To so hold is to impose no hardship upon any one. The state has no interest in crippling or burdening enterprises conceived, fostered and promoted solely for the relief of its needy or the advancement of the moral, social and religious interests of its people. We find no precedent inconsistent with the conclusion here indicated. The case is one involving the construction of our own statute, and we believe the judgment of the trial court is in harmony with its manifest spirit and purpose.

It follows that the appeal can not be sustained, and the judgment appealed from is *affirmed*.

H. A. SEARLES, Administrator of the Estate of HARRY C. NUTTER, Deceased, v. THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY OF MILWAUKEE, Appellant.

**Parties:** WHEN NECESSARY IN EQUITABLE ACTION. The rule requiring  
1 all parties whose interests are involved in the litigation to be brought in applies in equitable actions only where the plaintiff is seeking relief to which he is not entitled, unless the decree can be made binding upon all those necessarily affected thereby.

**Forms of actions:** DISTINCTION: ABATEMENT. While the distinction  
2 between forms of actions has been abolished by the code, the distinction between actions at law and suits in equity still remains; and the abatement of an action at law for want of proper parties will be determined by the rules applicable to ordinary proceedings.

**Parties:** NONJOINER: REMEDY. The remedy for failure to bring in  
3 necessary parties is not by a pleading in abatement of the action, but by motion asking the court to order such parties to be brought in.

**Same.** Even if a plea in abatement for defect of parties were proper  
4 it would be necessary to show that the parties not joined were subject to process.

**Same.** That a defendant may be subjected to a suit on an inconsistent claim in another jurisdiction is not a defense to an action in a jurisdiction in which he is properly sued.

**Failure to bring in necessary parties:** EXCUSE. The rule that all  
5 persons having an interest in the suit should be made parties is not inflexible. Thus even in equity cases impossibility of bringing in necessary parties is an excuse for not doing so.

**Insurance:** ACTION UPON POLICY: ABATEMENT: ANOTHER ACTION PENDING. In this action upon an insurance policy by the administrator the defendant admitted liability but pleaded another action pending in a foreign jurisdiction by an assignee of the policy, and it is held that the administrator was not required to make such assignee a party to his action and that the pendency of the assignee's suit was immaterial to plaintiff's right of recovery.

**Same:** ASSIGNMENT OF POLICY: MENTAL INCAPACITY. One whose  
8 mind is permanently impaired from an excessive use of intoxicating liquors, so that he is irresponsible and unable to rationally transact business, is not bound by an assignment of his insurance policy, made while thus incapacitated, even though at the precise time of the assignment he was not intoxicated, or did not manifest any aberration.

**Same:** EVIDENCE. Evidence that plaintiff's decedent was incapable  
9 of transacting business at and before the assignment of the policy in suit was not incompetent as invading the province of the jury.

**Same:** INSTRUCTIONS. Where an issue of mental incompetency is  
10 so submitted that the jury could not have misunderstood the law applicable thereto, the judgment will not be reversed on account of general statements in the instructions which might, under other circumstances, have been prejudicially erroneous.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN,  
Judge.

THURSDAY, JUNE 16, 1910.

ACTION to recover on a policy of life insurance. The issue raised by the defendant was as to the ownership of the policy at the time of the death of the insured. There was a verdict for the plaintiff, and from judgment thereon the defendant appeals.—*Affirmed.*

*Guernsey, Parker & Miller*, for appellant.

*Bowen, Bremner & Alberson*, for appellee.

McCLAIN, J.—In March, 1887, the defendant issued to Harry C. Nutter, plaintiff's intestate, a policy of life insurance in the sum of \$1,000, payable to his legal representatives. In September, 1906, said Nutter died at Kansas City, Mo., to which place he had removed in March preceding from Des Moines, where he resided at the time of the issuance of the policy and thereafter until

such removal. Soon after removing to Kansas City, Nutter negotiated a sale of this policy to C. E. Shepard & Co., incorporated, of Hartford, Conn., receiving in consideration therefor the sum of \$410, and executing a formal assignment. The business of Shepard & Co. was to deal in policies of insurance. The defendant admitted liability under the policy in this action brought thereon by plaintiff, as Nutter's administrator, but averred the assignment to Shepard & Co., and the institution by that company of a suit on the policy in a court of Connecticut, which suit was still pending, and that it had requested plaintiff to appear in said suit and interpose any claim that he might have as administrator to the proceeds of such policy, which request the plaintiff declined to comply with. And defendant further alleged that there was a defect of parties in this case on account of the failure to make Shepard & Co. a party thereto, which defect rendered further proceedings in this case illegal. The plaintiff replied, alleging that the assignment was made in Missouri, and was void under the laws of that state, because the assignee had no insurable interest in the life of the insured, and also that at the time of the execution of the said assignment said Nutter was of unsound mind, and in such state of mental derangement as to be unable to understand the nature of said transaction or the effect thereof. The court overruled defendant's motion to strike from plaintiff's reply the allegations as to the invalidity of the assignment under the laws of Missouri, but on final submission of the case to the jury did not leave to them any issue of fact to be determined under those allegations of the reply, and the sufficiency of such allegations need not now be considered. We have for determination on this appeal therefore substantially two questions: First, should the plaintiff have been denied relief on account of the failure to make Shepard & Co. a party defendant in the case; and, second, was the issue as to Nutter's mental

incapacity at the time of the assignment of the policy supported by sufficient evidence to justify its submission to the jury, and was this issue submitted without substantial error?

I. The question as to whether the action could be maintained by plaintiff, conceding that a formal assignment of the policy to Shepard & Co. had actually been made before Nutter's death, without making such assignee a party to the action, was raised by allegations in the answer which amounted practically to a plea in abatement, and the contention for appellant in this respect is that after it was alleged and in effect conceded that an assignment valid in form and effective, if Nutter had sufficient mental capacity to make it, had been made, plaintiff could not proceed in the action until Shepard & Co. had been brought in, so that the judgment would be binding upon such assignee. As Shepard & Co. was a nonresident of this state, it is apparent that the plaintiff could not make such assignee a party, and the practical result of appellant's contention would be that a suit in this state could not be maintained by plaintiff on the policy, even though plaintiff was able to show to the satisfaction of the jury that the assignment was invalid on account of Nutter's want of capacity to execute it, and that plaintiff's only effective method of procedure would be to intervene in the action alleged to have been brought by Shepard & Co. in Connecticut. This proposition of law is, we think, unsound, for reasons which may be very briefly pointed out.

This is an action at law, and as between plaintiff and defendant is properly brought in this state. No action is pending elsewhere to which plaintiff is a party that can be pleaded in abatement of the present action, for plaintiff has not subjected his right of action to adjudication in any other court. The rule as to necessary parties, requiring that

1. PARTIES: when necessary in equitable action.

all parties whose interests are involved in the matters to be adjudicated must be brought in, has application only in proceedings in equity where the plaintiff is asking some relief to which he is not entitled, unless he can make the decree binding on those who are to be necessarily affected by it. The cases relied upon for appellant are all of that character. See *Miller v. Mahaffy*, 45 Iowa, 289; *Mahr v. Norwich U. F. Ins. Co.*, 127 N. Y. 452 (28 N. E. 391); *Disbrow v. Creamery Pkg. Mfg. Co.*, 104 Minn. 17 (115 N. W. 751); *Donovan v. Champion*, 85 Fed. 71 (29 C. C. A. 30); *Jessup v. Illinois Cen. R. Co.* (C. C.) 36 Fed. 735; *Blanchard v. Biglow*, (C. C.) 109 Fed. 275; *Collins Mfg. Co. v. Ferguson* (C. C.) 54 Fed. 721.

While it is true that in this state distinctions between forms of action are abolished, the distinction between "actions at law" and "suits in equity," remains, and we think that the question as to when an action at law is to be abated for want of proper parties must be determined by the rules applicable to the ordinary proceedings.

It is provided, in Code, section 3466, as follows: "The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when the determination of the controversy between the parties before the court can not be made without the presence of other parties, it must order them to be brought in." It is apparent from this section that the remedy for failure to bring in necessary parties is not by pleading by way of abatement, but by motion asking the court to order such parties to be brought in. *Stroup v. Bridger*, 124 Iowa, 401 (100 N. W. 113). It is sufficient answer to appellant's contention that it did not ask to have Shepard & Co. made parties in order that it might be bound by the adjudication, but

2. FORMS OF  
ACTIONS:  
distinction:  
abatement.

3. PARTIES: non-  
joinder:  
remedy.



interposed instead an anomalous answer by way of plea in abatement contesting plaintiff's right to have judgment against the defendant, because the determination of the issues involved a question in which Shepard & Co. might be interested.

Even if a plea of abatement for defect of parties were proper, it seems that it would be necessary to show that the parties not joined are subject to process. *Boseker v. Chamberlain*, 160 Ind. 114 (66 N. E. 448). <sup>4. SAME.</sup> Shepard & Co. is not here objecting

to a rendition of a judgment against the defendant, nor questioning the right of plaintiff to sue on the policy. Plaintiff makes allegations, and supports them by proof, entitling him to recover a judgment against the defendant, and we are unable to see how in an action at law the right to have these issues determined can be affected by an allegation by defendant in the alleged interest of Shepard & Co. that a recovery from defendant would be prejudicial to such interest. The judgment will in no way bind Shepard & Co., nor deprive it of any right of action which it may have. It is not necessary that there be any saving of the rights of Shepard & Co., for its rights can be in no way affected by the judgment.

But apart from any mere question of procedure, it is plain that plaintiff should not be put in a position of having to seek his relief in a foreign jurisdiction when he alleges a complete cause of action as against the defendant. No doubt there are cases even at law where a judgment can not be rendered on account of the absence of necessary parties without whom no judgment would be proper. *Decatur County v. Bright*, 57 Iowa, 724; *Fowler v. Doyle*, 16 Iowa, 534. But this case is not of that character, for plaintiff under his allegations is entitled to a judgment against the defendant alone. He asks no relief as against Shepard & Co., and the defendant inter-

poses no defense which can not be fully determined without entering a judgment that will bind that company.

The fact is that the inability to get plaintiff and Shepard & Co. into the same jurisdiction, so that a judgment may be rendered as to the validity of the assign-

ment which will be binding on both of  
5. SAME. them, is not a misfortune of plaintiff, but of the defendant. Were it possible for defendant by proceedings of interpleader or otherwise to have a final adjudication in one action as to the validity of the assignment, it no doubt would do so, standing back ready to pay the amount due on the policy to whichever party was found to be entitled thereto. It would be protected fully by such judgment. But we are unable to see how defendant can saddle its misfortune upon the plaintiff. We find no authority for holding that, because a defendant may possibly be subjected to suit on an inconsistent claim in another jurisdiction, he can successfully resist payment in a jurisdiction in which he is properly asked to defend. The practical result of appellant's contention would be that it could not be successfully sued in any jurisdiction, unless plaintiff and Shepard & Co. should without any obligation to do so amicably agree that their claims should be submitted to the same court, a court which would be foreign to the one or other, or perhaps both of them.

Even in equity cases the impossibility of bringing in necessary parties is a reason for not doing so. In Hawes, Parties to Actions, section 19, we find the principle thus stated: "The rule that all persons

6. FAILURE TO  
BRING IN  
NECESSARY  
PARTIES:  
EXCUSE.

having an interest in the suit should be made parties is not inflexible. It is a rule of convenience, adopted by courts of chancery to shorten litigation, to prevent doing business by halves, and may be dispensed with when impracticable or very inconvenient; as when such persons are very numerous, or are unknown, or are dead, and their representatives

are unknown, or are insolvent, or beyond the jurisdiction of the court. . . . The rule being a rule of convenience, courts will not allow it to be so applied as to defeat the very purpose of justice, if they can dispose of the merits of the case before them without prejudice to the rights of other persons who are not parties, or if the circumstances of the case render the application of the rule impracticable." This principle is well illustrated by what is said in *Jessup v. Illinois Central R. Co.* (C. C.) 36 Fed. 735, a case relied upon for appellant.

The learning on the subject of parties to suits in chancery is copious, and within a limited extent the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties.

There is another class of persons whose relations to the suit are such that, if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case; but, if this can not be done, it will proceed to administer such relief as may be in its power, between the parties before it. But there is a third class whose interest in the subject matter of the suit and the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court can not proceed. In such cases the court refuses to entertain the suit when these parties can not be subjected to its jurisdiction.

It is evident that in the case before us Shepard & Co. would fall within the second of the classes of parties enumerated, for, while it is interested in the determination of the validity of the assignment, full relief as against the defendant may be granted without its presence. The con-

venience to defendant of having Shepard & Co. brought in for the purpose of having it bound by the adjudication might be a sufficient reason for requiring it to be brought in, if practicable. But the importance of doing so would clearly not be a reason for denying to plaintiff the relief against defendant to which plaintiff may show himself to be entitled. In the case of *Kelly v. Norwich F. Ins. Co.*, 82 Iowa, 137, it was contended, the action being upon a policy of fire insurance, that the plaintiff was not entitled to recover because a recovery against the defendant had already been had in a New York court by one claiming in the same interest, practically by assignment, and with reference to a direction by the trial court that the burden rested on the defendant to show that the policy was in fact assigned, this court said: "Counsel insist that the burden rested on the other party to show that it was not so assigned. The defendant as a defense pleaded the assignment. . . . Surely there is no presumption in law of the fact pleaded as a defense which changes the rule and casts the burden upon the other party." And the court further said: "A motion to make Mahr & Sons (the persons claiming to have the right of action by assignment) parties was rightly overruled. They were not interested in the event of the suit for the reason that a judgment in it would not affect them. The plaintiff was not required to make them or others who may claim an interest adverse to plaintiff parties to the suit. It will be remembered that this is an action at law to recover on a contract. The plaintiff shows as assignment of the contract to himself. He is not required to inquire if there are others who claim to hold an interest in the contract. Mahr & Sons could have under the statute intervened, but the plaintiff's action can not be defeated on the ground that they were not made parties to the suit."

The New York case in which the assignment involved

7. INSURANCE:  
action upon  
policy: abate-  
ment: another  
action pending.

in the case last cited was referred to appears to have been *Mahr v. Norwich Union F. Ins. Co.*, 127 N. Y. 452 (28 N. E. 391) in which the plaintiffs sued in equity claiming to be the owners of the policy of insurance, and asking that the defendant be restrained from paying the amount to the insured or his alleged assignee in Iowa. In that case the court held that plaintiff was not entitled to relief, because the insured or his alleged assignee in Iowa had not been made a party, and it sustained this ruling on the ground that the action was to establish the equitable title of the plaintiffs to the policy, and prevent the company from paying the proceeds to any one except themselves. It is admitted that there is an essential difference between the practice at law and in equity in determining who are proper and necessary parties even under New York practice, after which ours is in general modeled, and we have no doubt that, if the action in New York had been at law, the court would have adjudicated whatever controversy was presented as between the plaintiff and the insurance company, although it was advised that some inconsistent claim to the proceeds of the policy was made by the insured.

In *New York Life Ins. Co. v. Smith*, 67 Fed. 694 (14 C. C. A. 635), the court, discussing the question whether, in view of the allegation of the insurance company that the insured had assigned the policy, he was bound to make such assignee a party, very pertinently says that, if the company's position in this respect is sound, the same objection could be made to any action brought by the assignee, and that, while it might be necessary in equity that this be done, there is no such requirement in an action at law.

We reach the conclusion, therefore, that in this action it is wholly immaterial to an adjudication between the plaintiff and defendants that Shepard & Co. be made parties in order that as against said company the validity

of the assignment which defendant says was made to it should be adjudicated. So far as defendant is concerned, that question was adjudicated, and we see no reason for interfering with the judgment in this respect.

II. The allegation of plaintiff as to Nutter's mental incapacity rendering the assignment of the policy by him invalid was that at the time of making such assignment he was of unsound mind, and in such a state of mental derangement as not to be able to understand the nature of said instrument or the effect thereof. The evidence for

8. SAME:  
assignment  
of policy:  
mental  
incapacity.

plaintiff tended to prove, not that Nutter was intoxicated at the time the assignment was made, but that his mental faculties had become so far impaired by the long existing habit of using intoxicating liquors to excess that he was irresponsible and unable to rationally transact business. Without setting out the evidence as it appears in the record, it is sufficient to say that there was an ample showing to sustain the finding of the jury that Nutter was not possessed of a mind capable of forming an intelligent judgment with reference to his actions. Cases cited for appellant in regard to intoxication as a ground for setting aside a contract or as to the effect of temporary aberrations due to intoxication or otherwise are not in point. If before this assignment was made Nutter's mind was permanently impaired to such an extent that he could not act rationally, then his contract of assignment was not binding upon him, and it is immaterial that at the precise time the act was done he was not intoxicated or did not manifest any aberration.

It is contended, however, that there was error in allowing witnesses to testify for plaintiff that in their judgment Nutter was not capable of transacting business at and prior to the time when the assignment was made. It is said that such answers were incompetent as invading the province of

9. SAME:  
evidence.

the jury. But this question has been recently discussed in the cases of *Glass v. Glass*, 127 Iowa, 646, and *State v. McGruder*, 125 Iowa, 741. In view of what is said in these cases, it is unnecessary to further discuss *Betts v. Betts*, 113 Iowa, 111, and *Pelamourges v. Clark*, 9 Iowa, 1, relied upon for appellant. The answers were not open to the objection which is urged against them.

Counsel discuss at some length instructions given by the court with reference to the rules to be followed by the jury in determining whether Nutter was incapable of executing a valid assignment. We do not find it necessary to enter into a detailed analysis of these instructions. They seem to fully present to the jury all the considerations which should properly be taken into account under the evidence in determining the question and properly leave it to the jury to say whether Nutter's mind had become affected by intemperate habits to such an extent that he was incapable of executing such assignment. In one of these instructions the jurors were told that "drunkenness itself is a species of insanity, and may invalidate a transaction or contract made while in a drunken condition." We think this statement to have been unfortunate, for two reasons: Drunkenness is not in itself necessarily a species of insanity, and there is no evidence that the assignment was made while Nutter was in a drunken condition. But in neither of these respects did the instruction apply to any question submitted to the jury for determination, and there is no intimation in the instructions that the statements which we have quoted had such application. We are satisfied that the question of Nutter's mental capacity at the time the assignment was made was so submitted to the jury that they could not have misunderstood the law applicable thereto, and we are not willing to reverse the judgment on account of general statements in the instruction which might under

10. SAME:  
instructions.

other circumstances have been prejudicially erroneous. It was sufficient, as the court told the jury, to invalidate the assignment, if they found that when it was made he did not know what he was doing and understand the consequences of his act. *Nowlen v. Nowlen*, 122 Iowa, 541. And see *Merchants' Nat. Bank v. Soesbe*, 138 Iowa, 354; *Elwood v. O'Brien*, 105 Iowa, 239.

The preceding discussion renders it unnecessary to consider some questions presented in argument.

On the whole record we are satisfied that no prejudicial error was committed, and the judgment of the trial court is *affirmed*.

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HANS F. VOLQUARDSSEN v. IOWA TELEPHONE COMPANY,  
Appellant.

**Telegraphs and telephones: NEGLIGENCE: DELAY: PLEADINGS: BURDEN**  
1 OF PROOF. The delay in the transmission of a telephone message as contemplated by the statute is ordinarily failure to furnish proper connections for personal communication within a reasonable time, as well as in otherwise transmitting messages, and upon a showing of unreasonable delay the burden is placed upon defendant to establish by a preponderance of the evidence that the delay was not due to negligence on its part. But where the petition alleges particular acts of negligence occasioning the delay, rather than negligence in that respect generally, the defendant is only required to prove absence of negligence with respect to the acts alleged.

**Same: NEGLIGENCE: PROXIMATE CAUSE: EVIDENCE.** While a telephone  
2 company is liable under the statute for failure to give reasonably prompt connections to a subscriber, only such damages can be recovered as are the proximate result of the proven unreasonable delay. In this action the evidence is held insufficient to show that the destruction of plaintiff's building and machinery by fire was the direct and proximate result of defendant's negligent delay in failing to furnish plaintiff with prompt telephone connections so that he might give a fire alarm.



*Appeal from Scott District Court.*—HON. A. J. HOUSE,  
Judge.

THURSDAY, JUNE 16, 1910.

ACTION for damages resulted in a verdict for the defendant. A motion for new trial based on eleven grounds was filed and overruled as to ten of these and sustained as to one. Both parties appeal; that of defendant being last perfected. *Reversed* on defendant's appeal. *Affirmed* on plaintiff's appeal.

*Cook & Dodge and Guernsey, Parker & Miller, for appellant.*

*Henry Thuenen, Jr., for appellee.*

LADD, J.—The defendant owns and operates the telephone system in Davenport. The plaintiff was a subscriber and patron. He conducted a wooden shoe factory on the lots where his residence was located. Shortly after 1:30 o'clock in the morning of August 2, 1905, his wife heard a crackling sound, and, upon looking out, noticed a fire in the factory. She wakened plaintiff, who immediately went to the telephone, and took down the receiver for the purpose of giving a fire alarm. Ordinarily, removing the receiver signaled on the switch board at the central office to the employees, who then connected the line with telephone of the person with whom communication is desired. No one responded, though he called for "central" and "worked" the receiver for, as he testified, nine or ten minutes. He then handed the receiver to his wife, who got into communication with the central office in one or two minutes. Upon turning the receiver over to his wife, plaintiff went to the factory, and from there started to the fire department, which had a station about four

and one-half blocks from his house, and met the hose cart on the way. A neighbor had advised the department of the fire, and the men with apparatus were at the scene within a minute and a half thereafter. The petition alleged that "because of the negligence of defendant company's agents in charge of said company's switch board, or because of defendant company's failure to keep sufficient or competent persons in charge of said switch board, plaintiff was unable to obtain a response from the central office of the defendant company," and by reason thereof the entire factory was destroyed, when, but for said negligence, he would have been able to have given the alarm to the fire department promptly and much of his factory building and all of the machinery therein would have been saved. The court submitted the issues of negligence above mentioned to the jury, but ruled, in rejecting evidence and in refusing instructions, that the damages to the building and machinery were not the proximate result thereof. The jury returned a verdict for defendant, but a new trial was granted on the ground that the court had not submitted to the jury whether "defendant was negligent in the matter of keeping its appliances for communication with central in reasonable repair."

II. This ruling was based on statutes providing, in effect, that, upon proof of unreasonable delay in the transmission of a message, the burden is upon a telephone company to overcome the inference of negligence to be drawn therefrom. These statutes may

1. TELEGRAPHS  
AND TELE-  
PHONES: negli-  
gent delay:  
pleadings:  
burden of  
proof.

be set out:

Sec. 2163. The proprietor of a telegraph or telephone line is liable for all mistakes in transmitting or receiving messages made by any person in his employment, or for any unreasonable delay in their transmission or delivery, and for all damages resulting from failure to perform the foregoing or any other duty required by

law, the provisions of any contract to the contrary notwithstanding.

Sec. 2164. In an action against any telegraph or telephone company for damages caused by erroneous transmission of a message, negligence on the part of the telegraph or telephone company shall be presumed upon proof of erroneous transmission or of unreasonable delay in delivery and the burden of proof that such error or delay was not due to negligence upon its part shall rest upon such company; but no action for the recovery of such damages shall be maintained unless a claim therefor is presented in writing to such company, officer or agent thereof, within sixty days from time cause of action accrues.

Of course, the method of communication over a telephone differs from that by telegraph. Ordinarily in the former the company merely puts the sender in connection by wire with the sendee and the message is transmitted by word of mouth. The delay in the transmission or delivery contemplated by the statute is that of not furnishing the proper connection within a reasonable time as well as in otherwise transmitting messages so that upon a showing of an unreasonable delay by plaintiff it devolved upon defendant to establish by a preponderance of the evidence that such delay was not due to negligence on its part. Had the petition merely alleged unreasonable delay without describing the particular acts of negligence occasioning it or have alleged negligence generally, the ruling of the court might have been upheld. *Engle v. Railway*, 77 Iowa, 661. Ordinarily the defendant is in court to answer the matters averred in the petition only. *Heald v. Telegraph Co.*, 129 Iowa, 326; *Edgerly v. Insurance Co.*, 43 Iowa, 587; *Wirstlin v. Railway*, 124 Iowa, 170. And, if the instructions present the theory of the case as stated in the petition, the plaintiff has no cause of complaint. *Maloney v. Railway*, 95 Iowa, 255; *Denton v. Railway*, 52 Iowa, 161; *Briscoe v. Reynolds*, 51 Iowa, 673. Though it may not have been necessary to allege

in the petition wherein defendant was negligent, plaintiff did so, and this limited the inquiry as to the grounds of negligence thus charged. The plaintiff, having asserted the particular acts or omissions which occasioned the unreasonable delay, ought not to be permitted to take exception because of defendant's omission to prove freedom from negligence in other respects. And this is the rule long since adopted by this court in cases arising under similar statutes. Section 2056 of the Code, as construed, declares a railroad company liable *prima facie* "for all damages sustained by any person on account of loss or of injury to his property occasioned by the operation of such railroad;" the burden being on the company to exonerate itself from the charge of negligence on proof of damages sustained in the manner mentioned, and this court held in *Engle v. Railway, supra*, that it is sufficient to allege the facts as indicated in the statute without specifying the respects wherein the company has been negligent in setting out the fire. But, when this is done, we have discovered no case holding that plaintiff may rely on other grounds of negligence than those alleged or that more is exacted from the defendant to entitle it to a verdict than a showing of freedom of negligence in the respects charged in the petition. In other words, the plaintiff can not base his claim on one kind of negligence and recover on another, and the following decisions expressly so decide: *Carter v. Railway*, 65 Iowa, 287; *Miller v. Railway*, 66 Iowa, 364; *Babcock v. Railway*, 72 Iowa, 197. The allegations of the petition restrict the field of inquiry to the grounds of negligence stated therein, and all really decided in *Engle v. Railway, supra*, was that, even though alleged in the petition, the burden was on defendant to show itself free from negligence in the respects charged. The reference to the grounds as thus specified in that case as "redundant" was not accurate, but, as none of the cases last cited were mentioned an intention to overrule them

ought not to be inferred, especially when in harmony with elementary rules of pleading. It follows that, even though enough was shown to cast the burden of proving itself free from negligence upon defendant, it was not required to do more than refute the grounds specified in the petition, and for this reason the court erred in granting a new trial.

II. In ruling on the admissibility of evidence and in the refusal of instructions requested, the court held the damages to the building and machinery therein too remote, and for this reason that only nominal damages could be recovered. On this ground, also, plaintiff asked a new trial, but this was denied, and he has appealed from the ruling. As seen, the liability of a telephone company is defined by statute, but the damages recoverable must be the proximate result of the unreasonable delay proven. The duty alleged to have been violated was that to the subscriber as such and not owing to any special undertaking to maintain a fire alarm system in the city. Conceding the delay of the employees at the central office to furnish connection promptly with the fire department hose company No. 6 to have been unreasonable and the negligence to be inferred therefrom under the statute unexplained, was such delay the proximate cause of the loss? If so, a new trial was rightly granted even though on another ground. If not, the verdict should have stood and judgment have been entered thereon. The fire was the primary cause of the loss. The defendant did not start it, or have aught to do with its origin. The charge against it is that the negligence intervened as the efficient cause in the omission to do that which would have resulted in the extinction of the fire. Of course, if the failure to put out the fire was the direct and natural consequence of the unreasonable delay in making the connection, then there could be no doubt as to defendant's liability. But several links in the

2. SAME: negligence: proximate cause: evidence.

chain of sequences are involved in doubt and speculation. The fire was burning not only before plaintiff reached the receiver, but before he was awakened by his wife, who had heard the crackling of flames. Conceding that he was at the telephone nine or ten minutes, though minutes seem hours at such times, and that connection was made at the central office within two minutes thereafter, yet, as the hose company had been notified by another, there could not have been a delay of more than ten or twelve minutes, and, when the firemen arrived, the fire was beyond control. At what time must they have been on the ground to have saved the property? No one can answer save from conjecture. All realize that in such emergencies time is precious, but who can say from the situation as presented in this case how many minutes meant the loss of the plaintiff's property? Suppose the connection at the central office had been made promptly, would the fireman in charge of the fire station have responded promptly and promptly have rung the fire bell? Would the members of the department have heard and promptly have repaired to the scene? Was the apparatus for extinguishing the fire in working order and the water supply accessible and sufficient? Would all these intervening agencies have operated harmoniously and efficiently and with such promptness as to have put out the flames in time to have avoided a total loss? Manifestly these are matters of speculation, and yet all this must be assumed if the loss is to be traced to defendant's negligence. Each of these independent agencies necessarily must be linked together in a line of causation in order to connect it with the loss. None of them were under the direction or control of the telephone company.

Moreover, how far the fire had spread at the time the firemen would have been likely to have reached the scene had the connection been promptly made is left by the evidence a matter of speculation merely. And then there

are the weather conditions and the character of the material to be taken into account. After the experience of ages, fighting fire, even with modern machinery and apparatus, is precarious business, and uncertain in its results. Had everything worked out as calculated after the fire was over probably some of the building and machinery might have been saved. But the basis for a legal inference of this kind was not furnished by the evidence. The negligence of the telephone company may be ascertained, but that falls short of connecting it with the loss which is only possible through agencies entirely independent. If it, as the dominating force, acted through the intervening agencies, as mere instruments or vehicles in a natural line of causation, to the loss, there would be ground for saying defendant was liable. But the intervening agencies were independent, and what might have happened pure matter of speculation. The situation differs from that in which a hose through which water is being poured on a fire is cut and because thereof the flames which were being extinguished consume the property, for there the wrong is in preventing the fire department when actually engaged in extinguishing the fire from accomplishing its design. The circumstance that the firemen act voluntarily affords the wrongdoer no excuse. Whatever the instrumentalities, his act is the direct cause of shutting off the water supply. Thus in *Metallic Mfg. Co. v. Railway*, 109 Mass. 277 (12 Am. Rep. 689) the plaintiff's manufacturing plant caught fire and the hose was extended across defendant's track and connected with a hydrant. The water derived therefrom was applied to a fire so as to diminish it with the probability that it would have been extinguished in a short time when a freight train came along, and, though duly warned, carelessly ran over the hose, and injured it so that it could not be seasonably repaired, and the plant was consumed. The defendant was held liable on the principle that to extinguish fire,

firemen were authorized to take possession of the right of way. Though the hose was not plaintiff's property nor the firemen its employees, they were actually furnishing water to plaintiff, and thereby extinguishing the fire, and were rendering the same service as if hired by it and using its hose. Cutting off the supply in these circumstances was "as really an interference with plaintiff's possession as if it held the possession under deed and as if the men were laboring under a contract." The wrong was held to have been the proximate cause. This case was followed in *Little Rock Traction & Electric Co. v. McCaskill*, 75 Ark. 133 (86 S. W. 997, 70 L. R. A. 680, 112 Am. St. Rep. 48). See *Mott v. Railway*, 1 Rob. (N. Y.) 585. In *Kiernan v. Metropolitan Construction Co.*, 170 Mass. 378 (49 N. E. 648) the defendant interfered with the use of a hydrant by the firemen delaying the connection of the hose therewith so that the plaintiff's house was destroyed when but for such interference probably it would have been saved. The defendant was held liable, the court saying that, "though there was no obligation upon the city to extinguish the fire, it does not follow that the plaintiff was not deprived of anything to which she had a legal right if the defendant obstructed the fireman in getting water from the hydrant. She has a legal right to have firemen get water if they choose to do so from a supply provided especially for that purpose, and, while its obstruction may not have been a crime, . . . it was a tortious and wrongful interference with persons engaged in putting out the fire." In these cases stress is laid on the circumstances that, though the firemen or city may not be under legal obligation to extinguish the fire, *Tainter v. City of Worcester*, 123 Mass. 311 (25 Am. Rep. 90), they were actually engaged therein, and but for the direct interference with the hose or hydrant would have extinguished the fire. It seems unnecessary to elaborate on the distinction between these cases and that at bar between direct inter-



ference with the work of extinguishing fire actually in progress and the negligent omission of being instrumental in procuring such work to be undertaken by others. Enough has been said to indicate our conclusion that the damages proposed to be proven were remote and speculative in character, and the court rightly so held. *Lebanon, L. & L. Tel. Co. v. Lanham Lumber Co.* (Ky.) 115 S. W. 824 (21 L. R. A. (N. S.) 115) is directly in point. The rulings were correct.

*Reversed* on defendant's appeal. *Affirmed* on plaintiff's appeal.

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JOSEPH G. OBENCHAIN, Appellee, v. HARRIS & COLE  
BROTHERS, Appellant.

**Master and servant:** INJURY TO SERVANT: WARNING. Where a work-  
1 man is subject to distinct perils a warning as to one peril may not, as a matter of law, be sufficient warning as to the other. As in this case where plaintiff, operating a rip saw, was warned of a liability that the timber he was sawing might kick back such warning was not sufficient to cover peril arising from its being thrown forward, thus bringing his hand in contact with the saw.

**Same:** ASSUMPTION OF RISK: PLEADING. In this action the defendant  
2 denied the allegations of the petition and pleaded the assumption of the risks by plaintiff in his employment, one of which was the doing of acts alleged in the petition; and it is held that such allegations of assumption of risk added nothing to defendant's preceding general denial, and did not allege plaintiff's assumption of risk created or enhanced by defendant's failure to exercise reasonable care.

**Same:** FAILURE TO PROVIDE SAFETY APPLIANCES: NEGLIGENCE. Where  
3 it appeared that the saw which plaintiff was operating was not equipped with a divider in common use, which would have prevented the accident, the failure to provide the same was a violation of the statute requiring dangerous machinery to be equipped with safety appliances, and was negligence *per se*.

**Same:** SAFETY APPLIANCE: EVIDENCE. Under the evidence in this  
4 case the question of whether a certain safety appliance could have

been applied to the machinery with which plaintiff was working was for the jury.

Same: CONTRIBUTORY NEGLIGENCE: EVIDENCE. Under the evidence as to the manner in which plaintiff operated the saw with which he was at work the question of his negligent operation of the same was for the jury.

*Appeal from Black Hawk District Court.*—HON. C. E. RANSIER, Judge.

THURSDAY, JUNE 16, 1910.

ACTION at law to recover damages for personal injury. Judgment for plaintiff, and defendants appeal.—*Affirmed.*

*J. E. Williams*, for appellants.

*Pike & Knapp*, for appellee.

WEAVER, J.—The defendants are the proprietors of a factory in which they use various kinds of wood working machinery. The plaintiff was employed in one of their shops, and after he had served them about six days was injured in the manner hereinafter indicated.

The evidence on his part tends to show that at the time of the accident he was thirty-nine years of age, and prior to taking up this employment had been engaged in various lines of work. He had seen some service as a farmer, as a carpenter, as a motorman on the street cars, and as operator of an interlocking switch. He had also on former occasions worked for defendants in their glue-room and in piling lumber. He entered the service in which he was injured about March 4, 1908, and was told by defendants that their man who had operated a circular combination saw or rip saw had quit, and for the time being

they would put him at that work. Upon his statement that he had no experience with such machinery he was told he would soon become used to it, and was directed to rip certain boards into sizes suitable for some device that was being manufactured in the shop. He was given general directions concerning the cutting of the boards and instructed that if he stood directly behind a board when sawing there was a liability of its "kicking back" and striking him in the stomach, and to avoid this danger he should remember not to stand directly behind the piece being fed into the saw. No other warning was given him. The saw was not protected by hood or shield, nor was the machine provided with a "spreader" or "divider" to prevent the gripping or pinching of the boards upon the saw. On the sixth day of this employment, a sudden moving or twisting of a board which he was then sawing had the effect to bring his hand against the revolving saw, resulting in an injury by which he lost a thumb and two fingers. According to his testimony, the board did not "kick back," but "jumped" or twisted to one side, a movement which the witness ascribed to the pinching of the board on the saw blade. The injury received is charged to defendant's negligence, and recovery of damages therefor is asked. The specifications of negligence are that defendants, knowing him to be inexperienced and unskilled in such employment, put him to work with said saw without proper instruction or warning concerning the danger attending its operation. It also alleges that defendants neglected to provide for his use in such service safe, suitable and proper machinery and tools, and neglected and failed to furnish any guard or protection against such accidents as provided by the statute, by reason of which negligence it is claimed that plaintiff, without fault on his part, was injured as above stated. The defendants, denying the allegations of the petition, further pleaded in the following words: "That by reason of his employment

and the services plaintiff was engaged to perform for the defendants, he assumed the risk incident to such employment, and that one of the risks of such employment was the doing of acts alleged in his petition, and he assumed by reason of such employment the injury of which he complains." The cause was tried to a jury, which returned a verdict for plaintiff, and from the judgment rendered thereon the defendant's appeal.

In argument in this court appellants' counsel confines his attention to four several propositions, which we shall briefly consider in the order of their statement in the brief.

I. It is said that the evidence without dispute shows plaintiff to have been warned against the very peril of which he complains, and that the allegation of negligence in this respect is conclusively negatived. We do not so read the record. The danger of which he was warned was that of a board being thrown backward from the saw and against his person, and not that of a board being thrown forward or upward drawing his hand into contact with the saw. As we understand the evidence of the construction and practical operation of the saw, these are distinct perils arising from different causes, or, if not arising from different causes, they are clearly different perils, and plaintiff's testimony tends to show that he was instructed as to one only. The very phrase "kicking back" indicated a force moving from the saw in the direction of the operator and not from the operator forward in the direction of the saw. The danger suggested was that of injury from a flying board, and the instruction to stand on one side of the line of its probable flight excluded the idea that he was then being warned of the liability of his hand being drawn or thrown forward against the saw. The sufficiency of the warning is not so clearly established as to enable the court to dispose of it as a matter of law, and there was

1. MASTER AND  
SERVANT:  
injury to ser-  
vant: warning.

no error in submitting it to the jury. *Harney v. Railroad Co.*, 139 Iowa, 359; *Wilder v. Cereal Co.*, 130 Iowa, 263; *Lunde v. Cudahy*, 139 Iowa, 688.

II. It is further argued that in continuing to work after being warned of the danger plaintiff assumed the risk, regardless of defendant's failure to furnish guards or shield for the protection of their employees engaged in operating the saw. Our conclusion announced in the preceding paragraph, that the sufficiency of the warning given was a jury question, renders discussion of the objection here stated somewhat unnecessary. It may be well, however, to call attention to the fact that assumption of risk arising from defendants' negligence, if any, is not pleaded as a defense, and the case of *Sutton v. Bakery*, 135 Iowa, 390, so far as it treats of that subject, is not in point. Indeed, the primary and controlling proposition in that decision was the failure of the plaintiff to show himself free from contributory negligence, though other features of the case were incidentally touched upon. The allegation in the answer that plaintiff "assumed the risk incident to the employment" in which he was engaged added nothing whatever to the general denial which preceded it. As we have had frequent occasion to note, "assumption of risk" of the perils ordinarily incident to an employment where the master uses reasonable care for the safety of the servant is one thing, while "assumption of risk" from perils created or enhanced by the master's lack of reasonable care is another thing, and for the master to have the benefit of such defense it must be affirmatively pleaded and proved. The answer in this case alleges assumption of the risk first mentioned only, and thereby adds nothing to the issues. It does not plead assumption of the risk of defendants' negligence, and we can not therefore consider it. *Martin v. Light Co.*, 131 Iowa, 734; *Vohs v. Shorthill*, 130 Iowa, 544; *Steele v. Grahl*, 135 Iowa, 429; *Fitter v.*

2. SAME:  
assumption  
of risk:  
pleading.

*Telephone Co.*, 143 Iowa, 689; *Duffey v. Coal Co.*, 147 Iowa, 225.

There was evidence strongly tending to show that the rip saw by which plaintiff was injured could have been protected by shields or guards, thereby increasing the safety of the employees operating it, and especially that the pinching of the board upon the saw could have been effectually avoided by the use of a divider placed immediately in the rear of the saw and entering the channel cut in the wood. This attachment was shown to be in common use upon such saws when used for this kind of work. Failure to provide such protection was a violation of Code Supp. 1907, section 4999a2, and was therefore negligence *per se*. *O'Connell v. Smith*, 141 Iowa, 1.

3. SAME: failure to provide safety appliances: negligence.

As we have already pointed out, assumption of the risk thus negligently created is not pleaded, and we need not now undertake to decide whether such a plea can be made availing in any case where the statute so violated is one enacted for the special benefit of the employee, as distinguished from a measure which is primarily intended for the benefit of the public generally. That question has never been definitely decided by us, and we refrain from its discussion until a case is presented calling for its decision.

III. The appellants next say there is an entire absence of testimony showing that a divider could be practically applied and used on the particular kind of machine by which plaintiff was injured. There was ample evidence on this point to take the question to the jury. One witness at least says "the divider is in ordinary and common use upon such saws when used for ripping," and nearly all the expert witnesses speak of it as in general use and describe it in a manner to indicate its practicability in operating rip saws generally. While the leading witness for the

4. SAME: safety appliance: evidence.

defendants says there has never been made a divider for "this kind of machine," and, though he has seen hundreds of "these machines," there is not one in this country "equipped with a divider," he does not say that such protection is not practicable or cannot be supplied. Giving the statements of appellants' witnesses their strongest effect, they do no more than raise an issue of fact which was for the jury alone to decide.

IV. Was the plaintiff guilty of contributory negligence as a matter of law? It is so contended for the appellants. It is the theory of the defense that the board plaintiff attempted to saw or the guiding board by which the width of the cut was being regulated was wider at one end than the other, and that the pinching of the saw was caused by the mistake or fault of plaintiff in putting the wrong end of the piece to the front, thereby creating a tendency to crowd or pinch upon the saw. An examination of the record makes it by no means clear that this is the true explanation of the accident. It is at best a theory which may be true. Even if true, we think the court can not say as a matter of law that the danger was so apparent or that plaintiff had been so long in this employment, that as a man of ordinary intelligence he ought to have known the peculiar danger, if any, caused by sawing the board from one end rather than the other.

No errors are assigned upon the introduction of testimony, and while exceptions were noted to the instructions, none are argued in this court. Upon a record so presented the chief inquiry must be whether the action is one in which, after giving the appellee the benefit of the most favorable inferences to be reasonably drawn from all the testimony, this court must say as a matter of law he has made no case. Upon each essential proposition we find there was evidence for the jury, and there is shown no reversible error making necessary another trial.

The judgment of the district court is *affirmed*.

5. SAME:  
contributory  
negligence:  
evidence.

C. A. GALLOWAY, Appellant, v. J. W. TURNER IMPROVEMENT Co., Appellee.

**Master and servant: DUTY TO WARN: USE OF TERM "WARNING."** Ordinarily the duty of the master to warn a servant of danger relates to those dangers which are not obvious and are not known to the servant and which are or ought to be known to the master, although the term "warning" is often used to designate signals which are used by experienced workmen for mutual convenience and as a part of the method of co-operation.

**Same: SAFE PLACE TO WORK.** The master's liability for failure to furnish a reasonably safe place to work has reference to those dangers inhering in the place, as distinguished from those arising out of the negligence of a fellow servant.

**Same: SAFE PLACE TO WORK: DUTY TO WARN: EVIDENCE.** In this action for injury to a servant while employed about a machine used in digging a sewer, it is held that the defendant did not owe plaintiff, an experienced workman, the duty of warning him that the engineer in charge of the machine might negligently start the same without giving a signal; as the possibility of his thus starting the machine was as evident to the plaintiff as to the defendant.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN, Judge.

THURSDAY, JUNE 16, 1910.

**ACTION for personal injuries.** At the close of plaintiff's evidence the court directed a verdict for the defendant, and entered judgment against the plaintiff for costs. Plaintiff appeals.—*Affirmed.*

*Edgar T. Fee and Van Vleck & Holmes, for appellant.*



*Hewitt, Miller & Wallingford, for appellee.*

EVANS, J.—The defendant's motion for a directed verdict in the court below was based upon several grounds, and was sustained generally. The question, however, which has received the principal discussion on this appeal, and to which we shall give principal attention, is whether the negligence disclosed by the evidence on the part of the plaintiff was masterial or was that only of a fellow workman. We adopt the following statement of facts from appellant's argument:

At the time of the injury herein complained of, March 27, 1908, plaintiff was in the employ of defendant company, and as such was known and scheduled as a 'timberman.' Defendant company was engaged in digging ditches for the purpose of laying sewer pipe. In the conduct and operation of said business of digging a sewer ditch, defendant company used a large and complicated machine known and designated as a 'sewer digger' (a full description may be found in the testimony of A. A. Bonifield, Abstract, pages 14, 15). Said machine was operated by a twenty horse-power boiler and a twenty-six or twenty-eight horse-power engine which furnished the motive power therefor. It was the duty of plaintiff under his employment by defendant company to curb the ditch behind the machine by dropping planks or boards down edgewise into the ditch, pressing them against the banks and placing crossttimbers, jacks or stringers to keep the planks in place. The ditch varied in depth from nine to ten feet below the surface ground. It was also the duty of plaintiff under his employment by defendant company to shave down the sides of the bank, dig at the bottom of the trench, and shovel the loose dirt into the buckets of the digger. Such work became necessary by reason of the fact that the digging machine in starting from the surface of the ground or in turning an angle would not reach back and cut the bank in a perpendicular line. At the time of the injury, defendant company was engaged in digging a ditch and turning the corner at Thirty-Ninth and Ingersoll Avenue, Des Moines, Iowa. The sewer ditch at

this point varied in depth from four to ten feet on an incline plane. The distance from the foot of the digger at the bottom of the ditch to the foot of the incline plane was about two feet, and varied in distance as the incline plane of the ditch and the line from the foot of the digger to the surface of the ground. At the time of the injury in question, plaintiff in the performance of his duties as directed by defendant company, was at the bottom of said ditch shaving off the banks and shoveling the dirt into the buckets or scoops of the machine. He was spading about fifteen inches in width and keeping it down with the machine. From where the plaintiff was working in the ditch to the place where the engine was situated on the tracks in front of the ditch was from fifteen to twenty feet. The day was cold and windy. The machinery had been at a standstill for some considerable time. The engineer who operated the machinery had been off the machine and down in the ditch with plaintiff immediately before the machine was started in motion causing the injury to plaintiff. At the time of injury plaintiff was busily engaged in the performance of his duty and had no knowledge that the engineer had left the ditch and gone back to the engine. The evidence shows that the boiler and engine were not equipped with a whistle or any appliance for giving warning signals upon the stopping or starting of said machinery. The evidence further shows that there was a custom among all the employees to give a signal upon the starting or stopping of the said machinery. The custom, in substance, was that, when the machinery was at a standstill, and the employees working in the ditch, for the engineer before starting the machinery to shout or call to the men below some form of words of warning, or if the employees were ready to have the machinery started the warning would be called or shouted by the employee or employees in the ditch below to the man in charge of the machinery above. This custom had existed among the men for a long period of time, and had become well established and understood among the employees. Such direction had been positively given by the foreman in charge of the work to the various employees. Such custom had long been within the knowledge and observed by plaintiff. The evidence

also shows that the engineer had full knowledge of such custom, and had observed the same for a considerable time prior to the injury in question. At the time the injury in question occurred plaintiff as we have heretofore said was engaged in the performance of his duties at the bottom of the ditch and by reason of the small space within which to work, of necessity was in close proximity to the scoops or shovels of the digger, and, fully relying upon the custom long existing of giving warning before starting the machinery, had no reason to apprehend that it would be suddenly started without such warning having first been given. The undisputed evidence shows that without warning of any kind whatsoever said machinery was started in motion suddenly, resulting in the injuries complained of in plaintiff's petition. The uncontradicted evidence shows that plaintiff at said time gave no warning nor had he theretofore given any warning to start said machinery at the time it was set in motion. The evidence also shows that plaintiff had no knowledge or warning of any kind that said machinery was to be or was about to be set in motion.

Additional facts may be noted in the further discussion of the case.

In his original substituted petition, the plaintiff specified and classified the alleged negligence of the defendant as follows:

(1) That the defendant company was negligent in employing an incompetent, careless, unskilled, reckless and inefficient person to operate and manage said engine and machinery attached thereto. (2) That the defendant company was negligent in retaining in its employ an incompetent, careless, unskilled, reckless and inefficient person to operate and manage said engine and machinery attached thereto, after knowledge of such incompetency, carelessness, unskillfulness, recklessness and inefficiency of such persons. (3) That the defendant company was negligent in not supplying or equipping its engine or boiler with a suitable steam whistle, and in not directing its engineer to use the same by giving warning blasts to warn its other employees engaged in the performance of their duties and especially

this plaintiff in the trench. (4) That the defendant company was negligent in not providing a person and assigning him to stand on the surface of the ground in such a position as that he might and could see the engineer at his post of duty and the plaintiff in the performance of his duty in the trench, and warn the plaintiff of the purpose of the engineer to stop or start his engine and machinery attached thereto in motion. (5) That defendant company was negligent in not making and promulgating suitable and needful rules and regulations for the safe and proper manner in which said engine and machinery thereto attached should be operated by its employees and for the proper conduct of its employees, in carrying on defendant's business. (6) That the defendant company was negligent in not providing a safe place for plaintiff to work, in not providing suitable machinery with which to work, in not providing sufficient coemployees to assist plaintiff, and in not employing safe and competent coemployees with which to work.

Later, he filed the following amendment:

That it was the custom and duty of the defendant company before the starting of said engine and machinery thereto attached to give warning by crying out or shouting certain words of warning so that workmen working in the trench in the vicinity of said machine could retire to some safe place, and that plaintiff relying upon said custom of defendant company, and without warning by the defendant, and without fault on plaintiff's part, was injured as heretofore stated. And that because of the negligence and failure of the defendant company as above stated, plaintiff, at the time of the starting of the engine and the machinery thereto attached in motion from which he received his said injuries, had no knowledge or notice of the fact that said engine and machinery thereto attached were about to be started in motion while he was engaged in the discharge of the duties then assigned to him as heretofore stated, and while he was so working in close proximity to said machine; and that plaintiff relied upon the custom and obligation of said defendant company as above stated, and not otherwise, and his

injuries were the direct and proximate result of negligence of said defendant company in the matters and omissions heretofore stated.

Under the evidence the plaintiff must prevail, if at all, on the form of alleged negligence specified in the above amendment, and his argument here is directed to that view. The argument of the plaintiff here purports to be based upon the elementary propositions that the master owes to the servant a duty to warn and the duty to furnish him a safe place to work. The sum of the argument is that the plaintiff's place of work was rendered unsafe by the act of the engineer in starting the machinery without first giving to the plaintiff the customary warning or waiting for such warning to be given by some one else. The engineer was one Webster. It is not denied that Webster was a fellow servant of the plaintiff so far as the performance of his ordinary duties as engineer is concerned. It is claimed, however, that the duty to give a signal or warning to the plaintiff before starting the machinery was a nondelegable, masterial duty, and that failure to give it was a failure of the master in the performance of its duty, regardless of the agency to which its performance was intrusted.

Some confusion has crept into the argument, we think, through the use of the term "warning," as descriptive of the customary starting signal usually given by the engineer.

1. MASTER AND  
SERVANT: duty  
to warn:  
use of term  
"warning."

The masterial duty to warn a servant has its well defined limitations as a general proposition of law. Ordinarily it relates only to those nonobvious dangers which are not known to the servant, and which are known or ought to be known to the master. It has its most frequent application in favor of the newly employed or inexperienced servant. In common parlance, the terms "warn" and "warning" have a much broader application, and they are often used as designating the cries and signals which are

used by experienced workmen for mutual convenience and protection and as a part of the method of cooperation. And in this sense have these terms been used in this discussion; and there is a tendency in the argument to assume that the masterial duty to warn is as broad and comprehensive as the common parlance of these terms.

And so it may be said that the liability of the master for failure to furnish to the servant a reasonably safe place to work has reference to those dangers which inhere in the place as distinguished from those dangers which arise in a place merely as the result of the negligence of a fellow servant. Keeping these elementary distinctions in mind, we may proceed to an analysis of the case.

2. SAME:  
safe place  
to work.

Plaintiff places special reliance upon the case of *Hendrickson v. Gypsum Co.*, 133 Iowa, 89. It is argued that the reasoning in that case is conclusive, and this as in favor of the plaintiff. If this contention is logical, then we have obliterated the fellow-servant rule without intending to do so in our holding in that case. The underlying thought of the opinion in that case was that the method of use of high explosives about that mine rendered the whole place unsafe, and that it left no means to the workmen to protect themselves while remaining in their place of work. And that therefore the master had no right to convert the place of the workmen into a place of danger by such use of high explosives in blasting except as he assumed the duty precedent to give notice of the proposed explosion so that the workmen could withdraw from the place of danger so created. This is only another way of saying that the right of the master to use high explosives in such a way as to render the places of the workmen dangerous is conditioned upon a previous notice or warning for the purpose of enabling them to withdraw. In case of an explosion, the place of the workmen became unsafe, not through the negligence of any fellow servant,

but in accord with the very plan of the master. It was held in effect, therefore, that the duty to warn the workmen to leave their places was inseparable from the right to such use of high explosives. The *Hendrickson* case was deemed to be a border line case and one presenting unusual difficulties in its solution. The reasoning of the opinion was close, and its distinctions were necessarily somewhat fine. It was not regarded as overturning any of the well-established rules of the liability of the master to the servant. But it was deemed to present a situation which called for the application of these rules in a somewhat exceptional way.

Turning to the case before us, the plaintiff's place of work was in a ditch behind the machinery. The place presented no inherent danger even when the machinery was in operation. The starting of the machinery did not require the plaintiff to leave his place or his work as a means of safety.

If he had received a warning notice from the engineer, he would not have left his work, nor his place of work. His injury resulted, not because of any particular danger inhering in his place of work, but because at the time the machinery started, he stood with one foot in or over the bucket of the machine. Whether that was a negligent act on his part is one of the questions which we will not discuss now. On the contrary, we will assume that it was not negligent, as a matter of law at least. This position of his foot was rendered possible by reason of his proximity to the machinery, but it was in no sense a necessity of his situation nor an incidental sequence thereof. It was simply one of those details of method of doing his work which he himself adopted. By all of the authorities, such details are beyond the foresight and control of the master. Assuming that the plaintiff was not negligent in so placing his foot, we should further assume that Webster was negligent in starting the machine without

3. SAME: safe  
place to  
work: duty  
to warn:  
evidence.

giving the signal which would doubtless have resulted in the plaintiff's removing his foot from the bucket. It seems clear to us, therefore, that plaintiff's place of work was not unsafe within the meaning of the law. The danger encountered by the plaintiff at the particular moment did not arise *out* of the place. The most that can be said is that it arose *in* the place, but out of the negligence of Webster. If we were to hold that every place of a workman where injury results to him through the negligence of another is rendered thereby an unsafe place, we should leave no defense to a blameless master against liability for the wrongs of fellow servants. We reach the conclusion that the plaintiff's evidence disclosed no violation of the masterial duty to furnish a reasonably safe place to work.

Turning, now, to the other specifications of alleged negligence in the failure of Webster to warn the plaintiff that he was about to start the machine, was Webster in such failure of duty at that point acting as a vice principal? It is not claimed that Webster was not a fellow servant so far as his general duties of work were concerned, both as engineer and while working in the ditch with the plaintiff. It is argued, however, that in so far as he was under duty to warn the plaintiff, he was carrying a masterial duty and was therefore a vice principal. To put it another way, what duty of warning did the master owe to the plaintiff? As already indicated, it owed him the duty of warning against such dangers as were unknown to him and were known or ought to be known to the master. The plaintiff was experienced in his work, having been engaged in it for nearly four years. Webster had been his fellow servant for the last two years of that time. Surely the master owed him no duty of warning against the danger of putting his foot in the bucket. The possible danger involved in such an act was as obvious to the plaintiff as it could be to the master. The master did not owe plaintiff the duty to warn him



that Webster *might* through negligence start the machine without a signal. This possibility was as manifest to the plaintiff as it could be to the master. It was also a changing detail of the progressing work, for which the master has always been held not responsible.

This brings us to an analysis of the real negligence which resulted in plaintiff's injury. Did this negligence consist in the failure of the master to warn the plaintiff that Webster was going to start the machine, or did it consist in the negligence of Webster in starting the machine before giving a signal to the plaintiff and without waiting for one to be given by anybody? If it be said that the negligence consisted in the master's breach of duty to warn the plaintiff against a danger known to the master and unknown to the plaintiff, what was the danger that was known to the master? Can it be said that the master must be deemed to know not only that Webster *might* start up the machine without signal, but also that he *would* do so? If the master did not know or have reason to know that Webster would so start the machine, then there was no duty to warn imposed upon it. The only possible answer to this position is that the master must be deemed to know what Webster must know, and that Webster knew that he was about to start up the machine, and that no signal had been given, and that such knowledge of Webster was the knowledge of the master. This argument can be tenable only on the theory that Webster was a vice principal, not simply in relation to the duty to warn, but in his capacity as an engineer. It can not be claimed otherwise than that, in his capacity as engineer, Webster was a fellow servant, and that if he prematurely started the machine it was necessarily the negligence of a fellow servant which could not have been foreseen or warned against by the master as such. It may be noted here that the six specifications of the original substituted petition which we have set forth all disappear by force of

plaintiff's own evidence, and the plaintiff has rested his case upon the theory which we have now been discussing. The sum of the situation is that under the evidence offered by plaintiff, the master had furnished a safe place to work, and had furnished proper machinery appliances, and experienced and competent fellow servants, and had promulgated suitable methods and rules of operation. The prosecution of the work and the adaptation of themselves to its changing details, and cooperation with each other, and the exercise of care for the mutual safety of each, were all duties which devolved upon the servants, and for the breach of which redress can be had against the offending party alone. Our conclusion is that the trial court properly directed the verdict. A reverse conclusion would quite destroy the fellow-servant rule and overturn the overwhelming weight of authority. For authorities in support of the conclusions here announced, see: *Wellihan v. National Wheel Co.*, 128 Mich. 1 (87 N. W. 75); *Bergstrom v. Staples*, 82 Mich. 654 (46 N. W. 1035); *Porter v. Silver Creek Co.*, 84 Wis. 418 (54 N. W. 1019); *Quigley v. Levering*, 167 N. Y. 58 (60 N. E. 276, 54 L. R. A. 62); *Herman v. Port B. M. Co.* (D. C.) 71 (Fed. 853); *Martin v. Atchison R. R. Co.*, 166 U. S. 399 (17 Sup. Ct. 603, 41 L. Ed. 1051); *Portance v. Lehigh Co.*, 101 Wis. 574 (77 N. W. 878, 70 Am. St. Rep. 932); *Labatt on Master and Servant*, vol. 2, sections 580, 601, 607-609.

The following cases from other jurisdictions are cited by appellant's counsel as tending to support their contention: *Belleville Stone Co. v. Mooney*, 60 N. J. Law, 323 (38 Atl. 835); *Hjelm v. Western Granite Construction Co.*, 94 Minn. 169 (102 N. W. 384); *Comrade v. Atlas Lumber Co.*, 44 Wash. 470 (87 Pac. 517).

The order of the trial court will be *affirmed*.

In the Matter of the Estate of FRANK R. CROCKER, Deceased, T. M. STUART, JR., Administrator of Said Estate, J. H. JAMISON, Receiver of the First National Bank of Chariton and other Creditors of said Bank, v. MINNIE E. CROCKER, Widow of FRANK R. CROCKER, and the Children of said FRANK R. CROCKER, Deceased, Appellants.

**Homesteads: CONVEYANCE BY INSOLVENT OWNER: RIGHTS OF CREDITORS.**

- 1 The homestead is not subject to the payment of debts of the owner, and he may dispose of it as he sees fit even though insolvent and done in contemplation of suicide; so that a conveyance of the homestead by the owner to his wife to enable her to secure her distributive share of his estate from other lands of which he might die seised, is not a matter of which his creditors can complain.

**Same: DELIVERY OF DEED.** The execution of a deed by the owner con-

- 2 veying the homestead to his wife, done in contemplation of suicide and delivered to a third person with instructions to deliver the same to his wife, will, upon delivery after his death according to instruction, constitute a sufficient delivery of the instrument.

**Homestead rights of widow: ELECTION: INCONSISTENT DEFENSES.**

- 3 In this action brought in the interest of the creditors of an insolvent estate, the widow did not originally make any claim to the homestead, but contended that she was not bound to take her distributive share so as to include the dwelling house used as a homestead, but subsequently claimed the homestead under a deed from her husband, of which she had no knowledge at the time of her original pleading.

*Held*, that she was entitled to resist the claim of the creditors by pleading title to the homestead under the deed, and also to insist upon her right to take a distributive share in the estate 'not including the homestead, under the statute authorizing inconsistent defenses.

**Same: CONVEYANCE OF HOMESTEAD: VALIDITY.** The fact that a deed

- 4 conveying the homestead also includes other property, a con-

veyance of which is in fraud of creditors, will not affect the validity of the instrument as a conveyance of the homestead.

**Same:** DISTRIBUTIVE SHARE OF WIDOW: WHAT INCLUDED: STATUTES.

5 Under the present statutes the share of the widow of an insolvent must be so set off to her that it will include the dwelling house given by law to the homestead.

*Appeal from Lucas District Court.*—HON. S. W. EICHELBERGER, Judge.

THURSDAY, JUNE 16, 1910.

THE opinion states the case. *Affirmed* on first appeal and *reversed* on second appeal.

G. G. Fancher and T. M. Stuart, for appellants.

T. M. Stuart, Jr., and O. A. & L. B. Bartholomew, for appellees.

SHERWIN, J.—In November, 1908, T. M. Stuart, Jr., administrator of the estate of Frank R. Crocker, deceased, filed in the district court a petition in which it was alleged that the estate of Frank R. Crocker was insolvent; that claims amounting to the sum of \$809,323 had been filed and allowed and that there were still other claims against said estate aggregating the sum of \$350,000. The petition alleged the death of Crocker on the 31st day of October, 1907, and that he died seised of certain real estate; that Mrs. Minnie E. Crocker, his widow, became the absolute owner of the undivided one-third interest therein by operation of law, and the children of the deceased above named became by operation of law the owners of the remaining undivided two-thirds interest in said real estate, subject only to the rights of the creditors of the deceased. The petition thus filed was an application for authority to sell real estate for the payment

of the debts of the estate. Following the filing of the administrator's petition Minnie E. Crocker filed in said court her election to take her distributive share of the real estate belonging to the estate of her husband in the language following:

Now, therefore, this certifies that the said Minnie E. Crocker, wife of said Frank R. Crocker, hereby elects to claim, take and receive the one-third interest or share in all the real estate of which deceased died seised, including the one-third interest or share in said homestead property. She claims that said homestead property is exempt from the payment of any and all debts against said estate, and in view of her election to take the one-third interest or share therein, the remaining two-thirds interest or share therein will pass to the five children of the deceased. That, as the creditors of said estate are not interested in said homestead property, there is no necessity of partitioning or dividing the same between her and said children at this time; and as it would be very difficult if not impossible to sell said property at this time for its full value, she does not desire that any order be made in relation thereto, but desires to preserve and protect her one-third share therein, and for this purpose files herein this statement of her election.

In a cross-bill Mrs. Crocker asked that her interest in all the lands of which her husband died seised be established, and that a partition of said lands be made by a sale thereof, but she therein made no claim to the homestead, nor did she mention it. The children of Mrs. Crocker, some of whom were adults, were made parties defendant by the plaintiffs herein. They all answered independently of the answer and cross-bill of their mother, alleging that, because of their mother's election to take her one-third distributive share of all of the real estate, the other two-thirds interest or share in the homestead property passed to them under the law, exempt from the debts of the father. On the trial Mrs. Crocker claimed

that she was not obliged to take her distributive share of the estate so that it would include the homestead, but the trial court found against such contention and ordered her share set off to her so that it would include the dwelling house given by law to the homestead. From such order she appealed.

After the decree above referred to had been entered and an appeal taken therefrom, Mrs. Crocker filed in the original action a petition denominated a second or amended petition, in which she alleged that:

Said Frank R. Crocker, deceased, on or about the 29th day of October, 1907, with the intent and expectation of committing suicide, executed to his wife Minnie E. Crocker, a deed to his homestead property . . . that immediately after the execution of said deed said Frank R. Crocker placed the same in an envelope and delivered the same to one Emma Powell, with directions to deliver the same to his wife, the said Minnie E. Crocker; that at that time the said Minnie E. Crocker was absent from home and in the state of Illinois, and that said Frank R. Crocker did not expect that she would return home for a few days; that knowing that his wife was absent from the state of Iowa, and that she would not return for a few days and until after the 31st day of October, 1907, he did not expect or intend that said deed would be delivered to her during his lifetime, but he did expect and intend that said deed would be delivered to her after his death.

It was further alleged that at that time the said Frank R. Crocker was:

The cashier of the First National Bank of Chariton, Iowa, and said bank had, through his mismanagement, become hopelessly insolvent, and he was expecting that a government examiner of banks would appear in Chariton on the 31st day of October, 1907, to examine said bank, and knowing that the said bank was bankrupt, he expected that said condition of said bank would become known on the 31st day of October, 1907; that in view of this fact

he determined to convey his said homestead property . . . to his wife, and commit suicide on the night following the 30th day of October, 1907, which he did.

That the envelope containing said deed was delivered to Minnie E. Crocker by said Emma Powell on the 2d day of November, 1907; that thereafter said papers with others were delivered to Guilford Crocker, a son of the deceased, who was soon afterwards appointed administrator of deceased. It was still further alleged that Mrs. Crocker paid no attention to the papers or property of her deceased husband, leaving all of her business connected therewith in the hands of her son, Guilford Crocker, and her attorney, T. M. Stuart; that the said Stuart had no knowledge of the existence of said deed until after the former decree was entered in the case; that he was at one time advised by Guilford Crocker that he had found among the papers of his father delivered to him by said Emma Powell a deed conveying to his mother a parcel of real estate adjoining the homestead property, but that said Stuart, laboring under the impression that said deed simply included the Pepper property, informed said Guilford Crocker that he thought it void because of the insolvency of his father when it was made. The prayer of the amended petition was that the former decree be so changed as to establish her individual ownership of the homestead property under said deed, and also to establish her right to a one-third interest in all of the other real estate belonging to said estate. The administrator, Stuart, and Jamison, the receiver of the bank, demurred to the petition as amended on the following grounds, among others:

(2) Said petition shows that the widow elected to take her distributive share, and that the matter as to whether or not such distributive share should include the homestead in question, has been fully adjudicated; (3) that said petition shows that said widow and children claimed in a former proceeding in this court that when

the widow elected to take her one-third distributive share in real estate in lieu of her homestead rights, that said homestead property descended to the widow and children exempt from debts and the widow having elected to claim the one-third interest in said property, the remaining two-thirds passed to the children and that said matters were fully adjudicated in said proceeding, and the said widow and children having elected to pursue such course therein, are now precluded from opening up said case and litigating such subject matter upon a basis . . . contrary to that relied upon by them in the first proceeding and are estopped from claiming title at this time under the purport of the deed set out in said petition.

That the petition shows that Crocker was insolvent at the time the deed to his wife was made, and that said deed was made with the intention and expectation of committing suicide, and was without consideration, and included the homestead with other property, and the said deed was therefore fraudulent and void; that the deed was void under the circumstances of its execution because the law provides that the distributive share shall be so set off as to include the dwelling house given by law to the homestead, and such conveyance would prejudice the rights of the creditors of the estate; that said petition shows that there was no legal delivery of the deed; that the facts pleaded did not entitle the plaintiff to relief. The demurrer was sustained generally, and the widow and children electing to stand upon their petition judgment was entered dismissing the same, and they appeal. The appeals were submitted together.

Frank R. Crocker had the absolute right to deed the homestead to his wife, no matter what his indebtedness or motive. No creditors had a lien thereon, and it not being subject to the payment of his debts, he might sell it or give it away if he wanted to, and no creditor can complain of such action. *Dettmer v. Behrens*, 106 Iowa, 585, and

1. HOMESTEADS:  
conveyance  
by insolvent  
owner: rights  
of creditors.



cases cited therein. Nor can it make any difference that he deeded it to his wife in contemplation of suicide, and for the purpose of enabling her to take her distributive share of his estate from other lands of which he might die seised. Had he seen fit to do so, he might have conveyed the homestead to a stranger without consideration, and, so far as his creditors are concerned, no question could be made as to the validity of such conveyance. And such a conveyance could not possibly affect or diminish the distributive share of the widow in his other lands. Creditors became such with knowledge of the homestead rights and of the right of a widow to a distributive share in the estate of her husband, hence a conveyance of property upon which they have no lien and which they can not subject to the payment of their claims against the debtor is not prejudicial to them, and they can not complain thereof. *Richards v. Orr*, 118 Iowa, 724.

There can be no serious question as to the sufficiency of the delivery of the deed in question if the averments of the pleadings are true, and for the purposes of this case they must be so considered. If Crocker made the deed after he had fully made up his mind to kill himself before the return of his wife, and gave the deed to Miss Powell with directions that it be given to Mrs. Crocker upon her return home, such acts would constitute a good delivery. *Foreman v. Archer*, 130 Iowa, 49, and cases cited therein.

The appellees do not claim that Mrs. Crocker had knowledge of the deed of the homestead to her before the original decree was entered. In their brief and argument they say that the "only question in this second appeal is as to the validity of the deed in question." But they do insist that, if it be conceded that the conveyance of the homestead was valid, and that a sufficient excuse has been made for not claiming the homestead thereun-

2. SAME:  
delivery  
of deed.

3. HOMESTEAD  
RIGHTS OF  
WIDOW:  
election:  
inconsistent  
defenses.

der before the decree was entered originally, the position of the appellants in now prosecuting the appeal from the first decree amounts to an election of remedies, and that they should not be heard on the second appeal.

This case does not, however, fall within the general rule relating to the election of remedies or estoppel. Here, the original suit was brought in the interests of the creditors alone, and Mrs. Crocker and her children were made defendants. In neither her answer nor her cross-bill did Mrs. Crocker make any claim to the homestead as a part of her distributive share under the statute. Nor did she make any other claim to it. Under the law she was entitled to her distributive share in all of the realty, and there was no possible way under the statute whereby she could avoid taking such share so as to include at least one-third of the value of the homestead. Mrs. Crocker's position at all times was that she was not bound to take her share so that it would include the dwelling house used as a homestead. She never has in our judgment elected to pursue any remedy. She has at all times been a defendant except as she in her cross-bill alleged her interest in the land substantially as it had been declared by the plaintiffs. Instead of claiming the homestead in the original proceedings, she was trying to escape having it set apart to her, and in now claiming to own it by virtue of a conveyance, she is not pursuing an inconsistent remedy. The most that may be said is that she has discovered an additional reason why she should not be compelled to take her distributive share so as to include the homestead, and in doing this she is doing no more than the law authorizes her to do. The children were claiming an interest in the homestead, it is true, but this they had a perfect right to do, and Mrs. Crocker's rights can not be affected by their action. Code, section 3620, provides that inconsistent defenses may be pleaded, and we are of the opinion that under that statute Mrs. Crocker would have the right to resist the claim of

the creditors by pleading absolute title to the homestead in herself, and also her right to take her distributive share so as not to include the homestead.

It is also said that, because the deed in question conveyed other property to Mrs. Crocker,  
 4. SAME: conveyance of homestead: validity. it is invalid as to the homestead property. We are cited to no authority so holding, however, and we do not know of any reason for such a rule.

On the first appeal but one question is involved, and that is whether the creditors can compel the widow to take her distributive share so that it shall include the dwelling house given by law to the homestead. The determination of this question  
 5. SAME: distributive share of widow: what included: statutes. requires us to construe a statute, Code, section 3367, which was enacted with the adop-

tion of the present Code in 1907. It is as follows: "The distributive share of the survivor shall be set off so as to include the ordinary dwelling house given by law to the homestead, or so much thereof as will be equal to the share allotted to her by the last section, unless she prefers a different arrangement; but no such arrangement shall be permitted unless there be sufficient property remaining to pay the debts of the decedents." This section is the same as section 2441 of the Code of 1873, with this exception: The last clause of section 2441 provided that "no different arrangement shall be permitted where it would have the effect of prejudicing the rights of creditors;" while the last clause of section 3367 provides that "no such arrangement shall be permitted unless there be sufficient property remaining to pay the debts of the decedents." Under the law as it stood before the enactment of section 3367, it was held that the creditors could not compel the widow or survivor to so take her distributive share as to include the dwelling house. *In re Estate of Coulson*, 95 Iowa, 696. See, also, *Kite v. Kite*, 79 Iowa, 491.

In the *Coulson* case it was also held, following our

previous decisions, that, when the survivor terminates his right to the homestead by abandonment, the homestead character is not terminated, but the homestead descends to the children free from the debts of the deceased owner. *Johnson v. Gaylord*, 41 Iowa, 362. In the *Coulson* case it was also said, "The decisions to which we have referred authorize the conclusion that the surviving husband or wife may elect to take a distributive share of the real estate of the deceased spouse, which shall not include the homestead which was owned by the decedent; that creditors can not prevent such apportionment; and that when it is made the homestead will descend to the issue of the decedent, and retain its exempt character in their hands." The cases holding that the homestead descended to the heirs of the decedent when abandoned by the survivor were bottomed on the fact that the homestead right was only a possessory one. *Butterfield v. Wicks*, 44 Iowa, 310. But the distributive share of the survivor is entirely separate and distinct from the homestead right, and the survivor can not have both. *Meyer v. Meyer*, 23 Iowa, 359; *Butterfield v. Wicks*, *supra*. Where the distributive share is set apart to the survivor, it vests absolute title in him. And, when there is an election to take the distributive share, it amounts to an abandonment of homestead rights. *In re Coulson*, *supra*; *Butterfield v. Wicks*, *supra*.

The Legislature has the undoubted power to fix the homestead rights and to say what the distributive share of the surviving spouse shall be and from what lands or property it shall be set apart. If, therefore, section 3367 requires such share to be so set off as to include the dwelling house given by law to the homestead the election of the survivor to take his distributive share and a decree in conformity therewith would vest the survivor with a fee title to the homestead, and the heirs would have no right therein.

*In re Estate of Coulson* was decided in October, 1895, by a majority opinion of the court. In the dissenting opinion of Judge Granger, he said, speaking of the majority opinion: "The proposition as stated is: When the owner of a homestead and of other real estate dies intestate, leaving a surviving husband or wife, and issue, and the survivor abandons the homestead, and elects to take of the real estate the distributive share, as provided by law, may that share be so taken as not to include the homestead, and the homestead be permitted to descend to the issue of the deceased spouse free from all liability for the debts of the decedents?" As thus stated that case presented the precise question before us in the instant case. The majority opinion therein was based on the construction that had previously been given section 2441 of the Code of 1873, in connection with the other homestead statutes. These decisions were based on the reasoning that the creditors could not be prejudiced by permitting the survivor to take his distributive share without including the homestead, because the creditors had no right to the homestead in the first instance. Section 3367 in positive and unmistakable language says that the dwelling house shall be included in the share so set off, unless there be sufficient property remaining to pay the debts of the decedents.

We do not see how the intent of the lawmakers could have been made clearer, and it is equally as clear to us that the particular language was not used without a purpose. In the report of the Code Commissioners no change in the old section was made; the change was made by the Legislature, which is significant. On the proposition involved in this branch of the case the trial court was clearly right, and its judgment will therefore be affirmed.

While one ground of the demurrer to the second petition was that there was an adjudication in the first trial,

the question is not argued by the appellees, and hence we do not determine it.

On the first appeal the judgment is affirmed, and on the second appeal the judgment is reversed.

*Affirmed* on first appeal, and *reversed* on second appeal.

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H. H. SAWYER, Plaintiff, v. FRANK R. GAYNOR, Judge,  
Defendant.

**Intoxicating liquors:** CONTEMPT: CONTINUANCE OF BUSINESS: QUALIFICATION. Where a saloon keeper by violating an injunction against illegal sale has forfeited the protection of the mulct law, he can not avoid a second charge of contempt on the theory that he has made a change in the method of conducting the business, but must qualify anew to entitle him to the benefits of the law.

**Same:** SUBSEQUENT SALES: ADJUDICATION. A discharge from contempt proceedings for the violation of an injunction against the illegal sale of liquor is not an adjudication of subsequent charges based upon sales made after the discharge.

THURSDAY, JUNE 16, 1910.

THIS is a certiorari proceeding, in the nature of an appeal, by which we are asked to review the orders of the trial court in a contempt proceeding against a saloon keeper for violating an injunction. Orders *annulled*, and cause *remanded*.

*John F. Joseph*, for plaintiff.

*Wilbur Owen* and *T. P. Murphy*, for defendant.

WEAVER, J.—In the year 1907, a perpetual injunction was entered by the district court of Woodbury county restraining Sam Gibson, a saloon keeper in Sioux City, from unlawful traffic in intoxicating liquors. On February 2,

1909, he was charged with violating said injunction, and contempt proceedings were instituted against him. On May 4, 1909, a hearing was had upon said charge in the district court, and Gibson was adjudged not guilty and ordered discharged. In a certiorari proceeding brought in this court to review said ruling we held that the contempt was sufficiently established, and reversed and annulled the order of discharge. *Sawyer v. Oliver*, 144 Iowa, 382. Pending the certiorari proceedings another charge of contempt was filed based on alleged acts done in violation of the injunction after February 2, 1909, the date of the first information. As we have in the first proceeding found the charge there made to be sufficiently established by the evidence, it follows that Gibson forfeited the protection of the mulct law not later than said date last named. He did not attempt to requalify by securing a new consent from the city council or otherwise until June 28, 1909, when he procured and filed such consent together with a consent of the adjacent property owners, but, so far as the record shows, he has never procured or filed a new bond as required by the statute. It clearly appears that he continued to keep and operate said liquor saloon uninterruptedly during all the period between February 2, 1909, and the date of the hearing upon the subsequent information. That such business was unlawful is too clear for argument. Having once forfeited the protection of the law, he could not relieve himself from its ban by a mere change of purpose or of method in the sale and disposition of his wares. If he would re-enter the protected business, it must be by the same gate and subject to the same conditions which would have been required of him had he never enjoyed the privilege before. That such is the requirement is manifest from the reason as well as the letter of the statute. The city council may refuse its consent to one who has shown a disposition to violate the law. The adjacent property owners may have concluded that one

who has demonstrated his disposition to break over legal restraints is not a desirable neighbor. The sureties upon his bond may prefer to no longer stand as sponsors for his conduct of the business, and, until he has met anew the conditions imposed upon all applicants for admission to the select number who according to our peculiar statute (Code, section 2448), may transact an illegal business under the protection of the law, the bar of the statute can not be successfully pleaded by him. We held in *Rink v. Bollinger*, 145 Iowa, 501, that one who forfeits his privilege under the statute is not required as a condition precedent to reentering the business to procure a new general statement of consent from the people of his county or municipality. The statutory requirement of such consent is deemed to be in the nature of a declaration of public policy concerning the traffic which continues effective until revoked according to law, but it does not relieve the dealer who has once forfeited the privilege from the necessity of making new qualifications, and he can regain its protection only by compliance with all the conditions imposed. We so held in *Buck v. Powers* (Iowa), 121 N. W. 1042, and in no other way can the law be interpreted and enforced without reducing it to a farce.

The release of Gibson on May 4, 1909, upon the charge filed February 2, 1909, was in no sense an adjudication of the subsequent charge based on acts alleged to have been done after the latter date. These being shown by clear and practically undisputed evidence, the district court should have adjudged him guilty of contempt.

Other questions argued by counsel need not be considered as those to which we have referred are decisive of the result. For the reasons stated, we hold that Gibson was improperly relieved of the charge of contempt, and the order discharging him therefrom is annulled, and the cause is remanded for further proceedings in harmony with this opinion.—*Annulled.*



In the Matter of the Guardianship of FRANK B. NELSON.

**Guardianship:** FAILURE TO MAKE TIMELY REPORT: REMOVAL: DISCRETION. The statute requiring a guardian to make report at least once a year and subjecting him to removal for failure to do so is not mandatory, but the court is invested with discretionary power to inquire into the merits of each case and to remove or refuse to remove the guardian for failure to file his report in time, as the safety of the trust and interests of the ward seem to require.

**Same:** DISCRETION OF COURT: EXCUSE OF GUARDIAN. In this proceeding for the removal of the guardian of an incompetent because of failure to file his report within the statutory time, the facts and circumstances and excuse of the guardian for such failure are reviewed, and it is held that there was no abuse of discretion in denying the petition for removal.

*Appeal from Crawford District Court.*—HON. Z. A. CHURCH, Judge.

THURSDAY, JUNE 16, 1910.

THE ward, Frank B. Nelson, having been adjudged of unsound mind, M. E. Jones was duly appointed his guardian under date of January 29, 1906. On November 27, 1907, the ward appeared by counsel and filed an application for the removal of the guardian on the ground that he had failed and refused to make any report to the court of his dealings in the matter of said trust as provided by law. On the same day the guardian filed a report in said matter as a substitute for one which he claimed to have prepared in due time and delivered to his counsel by whom the same had been filed or had been lost or mislaid. He also filed a resistance to the application for his removal. On December 14, 1907, the court

overruled the application for removal, from which ruling the ward perfected an appeal to this court on February 13, 1908. Thereafter on December 1, 1908, and while the appeal above mentioned was still pending, the ward filed another petition for the removal of said guardian on the ground that the last report made by him was on November 27, 1907, and that since said date though more than one year elapsed he had neglected and refused to make further reports as was his duty under the law. On the same day the guardian appeared, resisted the petition for his removal, filed his report, and made showing to explain why it had not been sooner presented. After hearing the evidence the court again denied the petition, and from this order, also, the ward has appealed.—*Affirmed.*

*L. H. Salinger, T. V. Walker, and B. I. Salinger, for appellant.*

*Conner & Lally, for appellee.*

WEAVER, J.—It is well at the outset to clearly define the questions, upon which we are asked to pass. Though there is some slight suggestion in argument of other reasons why the appellee should be removed from the guardianship, they are not made grounds of the relief asked nor were they considered or tried in the court below. Each of the two applications for the removal of the guardian is based upon the single complaint that appellee had failed to make report to the court within the time prescribed by statute. The decree of the trial court recites that this is the only question presented and decided. Counsel for appellant in their brief submitted upon these appeals also thus limit the question by stating that the action is “to remove the guardian for failure to make two successive annual reports” and that the issues to be considered are,

first, "whether the district court had any discretion about removing a guardian where it appears that he has failed to make annual report of his doings;" and, second, "whether it was not an abuse of discretion to deny such removal" in the present instance. To the propositions thus presented we shall confine our attention.

I. Has the court any discretion to refuse an application for the removal of a guardian where one or more failures to file yearly reports in due season are proven or admitted? The statute (Code, section 3203) requires a guardian to make report to the court at least once a year and failure to do so subjects him to a penalty and is made "ground for removal." The language of the statute making the failure a "ground for removal," but not providing the guardian *shall* be removed, indicates that, while such default shall be sufficient justification for an order of court removing him from the trust, such action is yet a matter within the reasonable discretion of the court acting in view of the particular circumstances of the case under consideration. It is proper, and it is the duty of the courts to insist that guardians show substantial obedience to statutory regulations, but it is conceivable that failure to report promptly may occur under circumstances involving no lack of good faith, and investigation may demonstrate that notwithstanding the omission the trust has been prudently and wisely administered, and that the proper protection of the ward's "interests" does not require any change in the guardianship. It would be an unwise law which would deny the court authority to look into the merits of each case and to remove or refuse to remove the guardian according as the safety of the trust and the interests of the ward shall seem to require. None of our decisions requires us to construe the statute more narrowly than is here suggested. In *McIntire v. Bailey*, 133 Iowa, 418, referred to by counsel, the application was not, as in

1. GUARDIANSHIP:  
failure to  
make timely  
report:  
removal:  
discretion.

the instant case, grounded upon the sole complaint that the guardian had failed to make yearly reports in due time, but upon the charge that he had wholly converted the trust funds to his own use, had presented no account thereof and had neither money, property, nor funds to which he could point as representing the trust estate. The view we here express that the statute does not deprive the court of discretion in such cases finds support in precedents from other jurisdictions. Indeed we find none which holds that removal for such omissions is mandatory where the guardian appears and is ready and willing to make full accounting and report. In passing upon a similar question it has been said that the Supreme Court will not interfere with an order removing or refusing to remove a guardian unless it appears that the trial court abused its discretion. *Johnson v. Metzger*, 95 Ind. 307. It has also been said that trial courts are allowed liberal discretion in such matters, and that their decisions will not be reversed on appeal unless it be made to appear that palpable injustice has been done. *King v. King*, 73 Mo. App. 78. See, also, *Ledwith v. Trust Co.*, 2 Dem. Sur. (N. Y.) 439. Other authorities have applied the very equitable rule that unless the statute makes the removal of a guardian mandatory on a showing of failure to report, an opportunity should be afforded him to make the overdue report and show if he can that the ward's interests have suffered no prejudice by the delay. 9 Encyclopedia Pleading and Practice, 923. Indeed, when counsel for the appellant came to a discussion of the legal propositions in their printed brief they say: "A statute making the failure to report once each year ground for removal of a guardian leaves discretion as to such removal, where it appears there has been such failure." Elsewhere they say: "Ordinarily, the matter of removal of a guardian rests in the sound discretion of the court appointing him, but this is a legal discretion which it is the duty of this court to correct where there has been an abuse thereof."

With this conclusion there can be no serious quarrel, and it leaves this case to turn upon the single inquiry considered in the next paragraph.

II. Considering the circumstances shown in evidence, did the trial court abuse its discretion in denying the application for the removal of the guardian? In considering this question this court is required to indulge in every reasonable intendment supporting the propriety of the rulings appealed from.

2. SAME:  
discretion  
of court:  
excuse of  
guardian.

The presumption of regularity of action by the trial court is peculiarly persuasive in probate and guardianship proceedings under our system of practice, in which those courts come to have more or less familiar knowledge of the several estates and trusts being administered within their jurisdiction, and are in far better position to know and appreciate the necessity and propriety of the orders made by them and the trustworthiness of persons holding such trusts than is possible for this court to attain from an examination of the printed record.

The appointment of the guardian as we have before noted, was made in January, 1906. On November 27, 1907, no report appearing on file, the petition was filed for his removal. The guardian immediately appeared with a report covering the entire period of his trust to that date, and made a showing that he had prepared a report within one year from his appointment and left it with his counsel to be filed and supposed that the duty had been performed. Counsel corroborate the statement and testify to their best recollection and belief the report was in fact left with the clerk. This showing and report were assailed by motion and demurrer, because they were confessedly made after the guardian had become liable to removal. The attacks upon the report were finally overruled, the report approved, and the petition for removal of the guardian denied on December 4, 1907. The court appears to have inquired

into the financial responsibility and personal fitness of the guardian for the trust imposed upon him and, as we must assume, also satisfied itself that the delay in filing the report had not prejudiced the interests of the ward. Under such circumstances there was no abuse of discretion in refusing the demand for the guardian's removal. As to the refusal of the second demand, there is even less ground for criticism. The last prior report, as we have already seen, was presented to the court November 27, 1907, and meeting such resistance as hereinbefore shown it was not disposed of until December 4, 1907. The next report was filed December 1, 1908, and was therefore within one year from the approval of the former report, but was one year and four days after such prior report was filed. To this report as to the former no objection or exception was taken except that it was filed out of time. Appellant's abstract herein states it to be "conceded for the purpose of the hearing that the guardian was guilty of nothing except failure to report." It must therefore be assumed that the showing made by the guardian as to the condition of the trust estate and his management disclosed no substantial ground of exception thereto save only as to the date of its presentation. While it may be true, as argued by counsel, that the statutes providing for report at least once a year contemplate that not more than twelve months shall intervene between the filing of successive reports, yet assuming, as we must, that removal for failure in this respect is subject to the legal discretion of the trial court we are very clear that refusal to order such removal for no other reason than a delay of four days in filing a report which is otherwise correct and satisfactory and where no prejudice is alleged or shown to the ward or to the estate is not an abuse of such discretion. The first report was filed during a term of court, and was disposed of before that term was finally adjourned. The second report was filed during the corresponding term one year later upon advice

of counsel that, if presented during such term, it would be timely. For the purposes of the case we may concede that the advice was incorrect and that the court if so inclined could have penalized the delay by removing the guardian, but if in view of the circumstances the court was satisfied that the guardian was making an honest effort to obey the law, and that not the slightest harm or injury had resulted to any party in interest, a refusal to make such order was not only well within the court's discretion but was also eminently just. From some matters stated in the abstracts and arguments it seems that the ward is disposed to deny that he is a fit subject for guardianship and that he has instituted or proposes to institute proceedings to be relieved therefrom. That controversy, if one exists, is not before us, and has no bearing upon the present appeals. We have to take the adjudication of the ward's incompetence as a verity until in some suitable proceeding that fact is again put in issue, and is regularly submitted to our review.

III. Errors have been assigned upon the rulings of the trial court in the admission of evidence. We shall not prolong this opinion for their discussion, because the essential facts upon which our disposition of the cases turn are such only as are admitted by appellant's own showing or express concession.

We find no reason for disturbing the orders entered by the trial court, and they are therefore *affirmed*.

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ED. GLOTFELTY, Appellant, v. H. L. BROWN, Treasurer of Jefferson County, Iowa.

**Taxation:** MONEYS AND CREDITS: WHERE ASSESSABLE. The place where  
1 a person lives, within the meaning of the statute relating to the  
taxation of moneys and credits, is the place of his residence.

**Same:** RESIDENCE: BURDEN OF PROOF. Where it is shown that the  
2 residence and domicile of a party has until recently been in this

state, it is incumbent upon him to show that he has acquired a new residence or domicile elsewhere, to avoid the payment of taxes in Iowa.

**Same.** Mere intention to change one's place of residence is not sufficient to avoid taxation; it must be accompanied by actual residence in a new location.

*Appeal from Jefferson District Court.*—HON. D. M. ANDERSON, Judge.

THURSDAY, JUNE 16, 1910.

. **APPEAL** from an assessment of omitted property.  
*Modified and affirmed.*

*J. P. Starr*, for appellant.

*Robert & H. B. Sloan*, for appellee.

SHERWIN J.—Two questions are presented on this appeal. Was the appellant a resident of Jefferson county, Iowa, in January, 1907, when the property in question was listed for taxation? Had the trial court power to render a personal judgment against the appellant for the amount of tax found due?

The appellee concedes that a personal judgment for the amount of the tax should not have been rendered, and this we think is correct. But the error in rendering such a judgment does not affect the merits of the case nor call for a reversal thereof. The residence of the appellant at the time in question is the material matter for determination. He was born in Jefferson County, and lived there until in March, 1906, when he sold the farm upon which he lived, and surrendered the possession thereof. He thereupon rented a house on the same farm, and lived there until in August, 1906. After that, he and his family visited friends in Iowa and Minnesota, and later they went to California, where they remained



until the latter part of March, 1907, when they returned to Jefferson county, Iowa. They rented a house in Fairfield during the summer of that year and in the fall bought a home there, where they have since resided. The appellant did not remove his household goods to California. He did not purchase property there, nor did he vote or pay taxes there. When he went to California, he undoubtedly intended to make that his future home if he found the conditions there satisfactory to himself and family. That he was not well enough pleased with conditions in California to stay there and to make it his permanent home is evidenced by its early return to Iowa. Section 1313 of the Code provides that moneys and credits shall be listed and assessed where the owner "lives," and the place where a person "lives," within the meaning of this section, has been held to be the place of his "residence." *Nugent v. Bates*, 51 Iowa, 77; *Cover v. Hatten*, 136 Iowa, 63.

The appellant's residence and domicile had been in Iowa until he left the state in the fall of 1906, and hence the burden was upon him to show that he had acquired a new residence or domicile. *Cover v. Hatten*, *supra*. A residence or domicile once gained remains until a new one is in fact acquired. A mere intent to change is not alone sufficient. *In re Estate of Titterington*, 130 Iowa, 356; *Cover v. Hatten*, *supra*. The intention to remain in a new location, coupled with actual residence, is sufficient to effect a change. But the evidence here fails to show the necessary intent.

The trial court was therefore right in its finding of fact, and the judgment on the merits must be affirmed. There being no authority for a personal judgment for the amount of the taxes, that part of the judgment will be set aside. As thus modified, the judgment is affirmed. As no additional costs were made because of the personal judgment, the appellants will pay all costs.—*Modified and affirmed.*

In the Matter of the Estate of WILLIAM HAMILTON,  
Deceased. ELIA HAMILTON v. MINA HAMILTON,  
Appellant.

**Wills:** ALLOWANCE TO WIDOW AND CHILDREN. The amount set apart  
1 and applied to the support of the widow and minor children of  
a decedent is not a part of the estate for distribution; nor is the  
right thereto an interest in the estate inconsistent with the widow's  
acceptance of the provisions of a will for her benefit.

**Same:** ELECTION BY WIDOW: RENTS AND PROFITS. It is presumed that  
2 a widow named as executrix will administer the estate in accordance  
with the terms of the will, and will accept the provisions therein  
for her benefit, until she elects otherwise: So that where the widow,  
as in this case, was the executrix under the will and was given a life  
estate in certain lands, she was under no obligation to account for  
rents and profits, although she may have delayed filing her election  
to accept the provisions of the will.

**Executors and administrators:** ACCOUNTING: ATTORNEY'S FEES. The  
3 allowance to an executor for attorney's fees in preparing his final  
report and securing his discharge is within the discretion of the  
trial court. And the fact that a report had been filed and an order  
of discharge entered was not conclusive of this question, where the  
executor's account was subsequently opened up and in a further and  
final account there was an additional showing of receipts and disbursements.

**Same:** EXEMPTIONS. Where it appeared that the exempt property  
4 set off to a widow was sold and accounted for the same as though  
it belonged to the estate and the proceeds were used in paying debts,  
the court properly refused to charge the widow with anything on  
account of the exempt property, on the theory that having accepted  
the provisions of the will she was not entitled to the exemptions.

*Appeal from Carroll District Court.*—HON. Z. A. CHURCH,  
Judge.

THURSDAY, JUNE 16, 1910.

THIS is a proceeding had on the petition of Ella Hamilton, as executrix of the estate of her deceased husband, asking the modification of her final report, on which she was discharged, showing that she had on hand at the date of such discharge \$161.08 of the money of the estate; whereas, in truth the estate was indebted to her for disbursements. Mina Hamilton, the sole heir of the estate, answering by her next friend, denied the allegations of the petition, and contested certain allowances claimed by the executrix. The court, after hearing evidence, made a new statement of the account of the executrix and allowed her compensation in the sum of \$31.25 and additional attorney's fees in the sum of \$25, and found that including these allowances, the executrix was entitled to credit as against the estate in the sum of \$51.72; and the allowance of \$25 for attorney's fees was made a charge against the real estate in the hands of defendant. The defendant appeals.—*Affirmed.*

*F. M. Davenport*, for appellant.

*Salinger & Salinger* and *M. M. Cooney*, for appellee.

McCLAIN, J.—It appears that by the will of William Hamilton, deceased, all his property, both real and personal, remaining after the payment of his debts and certain legacies, was devised and bequeathed to his wife, Ella Hamilton, for life, with remainder to this defendant, his sole heir at law, and that his wife being appointed executrix of his will disposed of his personal property and paid the debts of the estate, and on filing an account she was granted a final discharge, and the estate was declared settled. Subsequently she filed in the probate court an election to accept the provisions of the will in her behalf in lieu of her statutory share in the estate. Before

her appointment as executrix, she had petitioned the court for support, and after her appointment an allowance to her had been made on that ground in the sum of \$300. Without further going into detail, it is sufficient to say that, in the final accounting made by the probate court on the petition of the executrix to have her account restated, three questions are involved: First, is she entitled to retain as her own the \$300 allowed for her support, notwithstanding the fact that she subsequently elected to accept the provision made for her in the will; second, is she entitled to retain as her own the produce of crops raised upon the premises while in her occupancy after the death of deceased and before her formal election to take under the will; and, third, was the court justified in allowing her \$25 as attorney's fees to be paid out of the estate on sustaining her application to have her account corrected?

I. The contention of appellant that the acceptance of the provisions of the will in her favor was inconsistent with her right as surviving widow to have an allowance seems not to be supported by the language of the statute relating to such an allowance, nor by the decisions interpreting such statute.

1. **WILLS:**  
allowance to  
widow and  
children.

The provision is that "the court shall if necessary set off to the widow and children of the decedent under fifteen years of age or to either sufficient of his property of such kind as is proper to support them for twelve months from the date of his death." Code, section 3314. This provision is clearly intended to afford protection to the widow and children pending distribution of the estate, and the amount thus applied by the court does not become a part of the estate for distribution, nor is the right to it an interest in the estate. *In re Miller's Estate*, 143 Iowa, 120. In that case we held that the right to such an allowance was not cut off by the antenuptial contract by which the widow had agreed to accept certain specified property in full of all her interest in the estate of her husband. We

think the reasoning in that case is applicable here. The acceptance of the provisions of the will in her favor was not inconsistent with the relief by way of an allowance of temporary support for a year, and the widow as executrix was not bound to account for the \$300 received under such allowance.

II. The court did not err in relieving the widow as executrix from any obligation to account for the proceeds of crops raised upon the land of the deceased husband in which she was by the will given a life estate. 2. SAME: election by widow: rents and profits. It is true she did not file a formal election to accept under the will until later; but she was appointed executrix, and it was to be presumed that she would administer the estate in accordance with the provisions of the will, until she had elected to renounce such provisions in her favor and claim the share in her husband's estate allowed to her by law. In the absence of an election made as provided by statute, the widow is conclusively presumed to consent to the provisions of the will and to elect to take thereunder. Code, section 3376. If in this case the widow, after receiving the proceeds of crops raised on the premises in which she was by will given a life estate, had elected to take her distributive share, then no doubt she would have properly been required to account for such proceeds as rents and profits to which she was not entitled. But her election to take under the will simply affirmed the presumption which existed from the beginning that she would do so.

III. It was within the proper discretion of the trial court to make an allowance to executrix for attorney's fees in preparing her final report and securing her discharge. Code, section 3415. The fact that 3. EXECUTORS AND ADMINISTRATORS: accounting; attorney's fees. a previous report had been made under which an order of discharge had been entered did not necessarily show that no allowance for attorney's fees should be made when the court on a

subsequent application opened up the account. The defendant denies that any notice of the first application for discharge was ever served upon her, and claims that the first settlement and discharge were not therefore conclusive on her. See Code, section 3422. On the subsequent accounting the executrix acknowledged receipts not previously reported, and claimed credit for expenses not previously allowed, and, unless the final accounting was erroneous, she might properly be allowed out of the estate the expense of making such accounting.

IV. Counsel argue the question whether a setting off to the widow of exempt personal property was proper in view of her election to take the life estate given to her by law and refer to Code, section 3270, in

4. SAME:  
exemptions.

which it is provided that any person may dispose by will of all his property subject to the rights of homestead and exemption created by law, and the distributive share in his estate given by will to the surviving spouse with the limitation that, if such surviving spouse is named as devisee, it shall be presumed, unless the intention is clear and explicit to the contrary, that such devise is in lieu of such distributive share, homestead, and exemptions. By Code, section 3312, it is provided that personal property which is exempt from execution in the hands of decedent as head of a family shall after being inventoried and appraised be set apart to the widow as her property. The contention for appellant is that the provision for his widow made in Hamilton's will should be presumed to be not only in lieu of her distributive share, but also in lieu of the property which she might otherwise take as exempt. So far as we can discover, no such question was passed upon by the trial court. It is true that, as appears from the record, the executrix testified that there was set apart for her from the estate as exempt "two horses, two cows and calves, thirty-one hogs and shoats, one wagon, and one set of harness." But she further testified that the property

that was set apart to her as exempt was sold and accounted for the same as though it belonged to the estate, and the proceeds were used by her in paying off the indebtedness of the estate. On cross-examination counsel made it appear that the executrix had in her possession a cow which had been enumerated as a calf in listing her husband's property after his death. But it does not appear what the value of the calf was, and we think the court did not err in failing to charge the executrix with anything on account of exempt property.

The judgment of the trial court is *affirmed*.

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LYDIA M. SIMCOKE, Appellant, v. A. H. SAYRE, Treasurer of Guthrie County, Appellee.

**Taxation: BURIAL GROUNDS: EXEMPTIONS.** The unsold lots of a burial ground held and owned by a private individual for sale at a profit are not exempt from taxation under the provisions of the statute exempting public grounds, including places for burial of the dead, from which no dividend or profits will be derived: Nor is there an implied exemption of the same growing out of any question of public policy.

*Appeal from Guthrie District Court.*—HON. J. H. APPLE-GATE, Judge.

THURSDAY, JUNE 16, 1910.

SUIT in equity to enjoin the collection of taxes assessed and levied for the year 1907 against the unsold portions of a cemetery near the city of Stuart in Guthrie county. The trial court denied the relief asked, and plaintiff appeals.—*Affirmed*.

D. H. Miller and R. S. Barr, for appellant.

*C. B. Hughes*, County Attorney, for appellee.

DEEMER, C. J.—The trial court filed a written opinion, and, as both parties concede that the facts are correctly stated therein, we copy therefrom the following "Plaintiff owns the unsold portion of what is called 'South Oak Grove Cemetery,' situated within the corporate limits of the city of Stuart, Iowa. This cemetery includes about five and four-fifths acres of land and is divided into small lots about sixty-five of which have been sold for burial purposes at \$30 per lot, and there yet remains about four hundred and forty-four lots which are held for sale by plaintiff at \$30 per lot. It was platted as such in April, 1901, and the land on which the same is located is worth about \$200 per acre, as acreage property. In 1907 the city council of Stuart, Iowa, caused the unsold lots in this cemetery to be added to the assessment roll at a valuation of \$1,000. Plaintiff appeared before the council and resisted the proposed assessment, but from the adverse action of the city council took no appeal, and the same was duly returned to the defendant as treasurer of Guthrie county, with other property for the collection of the taxes thereon from the year 1907. This tax was not paid by plaintiff; but this action was brought to enjoin the defendant from collecting the same, on the ground that the property is not assessable, or liable for taxation."

Section 1304 of the Code Supplement of 1907, so far as material, reads as follows: "The following classes of property are not to be taxed: public grounds, including all places for the burial of the dead, crematories, the land on which they are built and appurtenant thereto, not exceeding one acre, so long as no dividends or profits are derived therefrom."

It is claimed that the land or lots in question are exempt from taxation under this section. There can be no doubt that the lands or lots are within an inclosure for the



burial of the dead, but this property is privately owned and is held for profit. The trial court made the following finding with reference to this: "Plaintiff owned this land prior to and at the time it was platted and dedicated as a cemetery. It was then worth not to exceed \$1,160. She was at some expense in platting and fencing said land, the exact amount of which is not shown. She has since sold sixty-five lots at \$30 each, for a total sum of \$1,950, and still has lots which she values at \$13,320. The annual income from hay cut from the lots is insignificant, but the prices at which these lots have been sold and the valuation put upon those unsold by plaintiff make an increase in value over the value of the land as acreage property beyond the expectations of the most avaricious speculative purchaser."

By the express terms of the statute, places for the burial of the dead are not exempt if dividends or profits are derived therefrom. The word "dividends" has a peculiar and definite significance. It means a distributive sum, share or percentage arising from some joint venture as a corporation or a proportionate amount arising from a bankrupt or other estate. The term "profit" has a much larger meaning, however, and covers benefits of any kind, excess of value over cost, acquisition beyond expenditure, gain, or advance. It is broad enough to cover any sort of advantage, advance or gain. The testimony shows not only a large gain or profit to plaintiff in the division and sale of the burial lots, but an income, although small, from the sale of hay produced from the lots. Plaintiff's dedication of the land to cemetery uses was not through philanthropic motives and lacks all elements of charity or benevolence. Her object seems to have been to profit from the transaction. The lots which were sold were not taxed, but those remaining in plaintiff's name were assessed and taxes levied thereon. In our opinion these remaining lots were not exempt from taxation under the statute quoted. Some

kind of an implied exemption arising out of public policy is claimed, but in our opinion there is no such exemption. It may be that the lots so laid out and on the strength of which other lots were sold can not be devoted to other purposes than for the burial of the dead; but with that question we are not concerned. Even though the use be limited, this is no reason why they may not be sold at tax sale. Authorities upon the question are not numerous; but *Brown v. Pittsburgh* (Pa.) 16 Atl. 43, tends to support our conclusion.

It is to be noted, in this connection, that originally and down until the Twenty-Sixth session of the General Assembly all places for the burial of the dead were exempt from taxation. See Code 1873, section 797; acts 26th General Assembly, chapter 29. The Twenty-Sixth General Assembly carried the qualifying clause into the law, and this was amplified in the Code of 1897, and perhaps further extended by section 1304 of the Code Supplement of 1907. There can be no question now that the qualifying clause applies to places for the burial of the dead. Applying the principle that taxation is the rule and exemption the exception, and that he who claims property is exempt must point out a statute conferring the privilege, we have no hesitation in holding that the unsold lots and land were properly assessed for taxation.

The judgment must therefore be, and it is, *affirmed*.

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A. W. TROUT V. THE MINNEAPOLIS & ST. LOUIS RAILROAD  
COMPANY, Appellant.

**Municipal corporations:** ORDINANCES: SINGLE SUBJECT. An ordinance  
1 regulating the speed of trains within the limits of a municipality,  
prohibiting the obstruction of streets and sidewalks by trains,  
making it unlawful for those not employed thereon to get on  
or off trains while in motion, and making such acts criminal

and providing punishment therefor, is not objectionable as containing more than one subject.

**Railroads: CROSSING ACCIDENT: NEGLIGENCE: EVIDENCE: QUESTION OF**  
2 **FACT.** Whether defendant's train was run at a speed in violation of the city ordinance when it struck plaintiff upon a public crossing, and whether statutory signals were given of its approach to the crossing were questions for the jury, although the testimony of plaintiff on these questions stood alone and was contradicted by several witnesses for the defendant.

*Appeal from Dallas District Court.*—HON. EDMUND  
NICHOLS, Judge.

THURSDAY, JUNE 16, 1910.

SUIT to recover damages for personal injuries. Verdict and judgment for plaintiff, from which the defendant appeals.—*Affirmed.*

*W. H. Bremner, White & Clark, and George W. Seevers, General Counsel, for appellant.*

*H. G. Giddings and W. H. Winegar, for appellee.*

SHERWIN, J.—The plaintiff was struck and injured by a south-bound freight train on the main track of the defendant's road within the corporate limits of the city of Perry. The accident occurred after dark, while the plaintiff was attempting to cross the appellant's tracks at a public street crossing. The plaintiff alleged that the train was being run at an excessive and high rate of speed and faster than six miles per hour, the limit of speed fixed by an ordinance of the city of Perry. It was also claimed that the appellant failed to give any alarm as its train approached the street crossing.

The plaintiff offered in evidence an ordinance of said city entitled: "An ordinance concerning railroads and

regulating the speed of their trains, prohibiting the obstruction of the streets and sidewalks by the same, making it unlawful for those not employed thereon to get on or off the same while in motion, making the same criminal and providing punishment therefor." The appellant objected to the introduction of the ordinance on the ground that its title contained more than one subject, "and not a single subject or object as required by law, and therefore the ordinance is invalid." The objection was overruled, and section 1 of the ordinance which prohibited a greater rate of speed in the city than six miles per hour was read to the jury. The appellant now takes the position that the ordinance is invalid because it contains more than one subject. Code, section 681, provides that "no ordinance shall contain more than one subject, which shall be clearly expressed in its title." An ordinance that contains more than one subject is invalid under this statute. *Dempsey et al. v. City of Burlington*, et al., 66 Iowa, 687; *Water Co. v. City of Marion*, 121 Iowa, 318. Waiving the sufficiency of the appellant's objection to the introduction of the ordinance, we go to the validity of the ordinance itself. In addition to the section that we have already quoted, it contains provisions prohibiting the obstruction of streets, crossings or sidewalks for a longer period than five minutes at any one time, and fixes a penalty for its violation. It also prohibits any person not in the employ of the railroad company from getting on or off of a moving train, and prohibits any boy under the age of sixteen from getting on or off any car or engine without authority so to do from the railway company or his parents or guardian. The violation of any of the provisions of the ordinance is made a misdemeanor.

We are of the opinion that this ordinance does not contain more than one subject within the meaning of the statute. It relates solely to the operation of trains and the conduct of persons with reference thereto. It is not serious-

1. MUNICIPAL  
CORPORATIONS:  
ordinances:  
single subject.

ly contended that two subjects are embraced in the sections prohibiting a greater rate of speed than six miles per hour, and prohibiting the obstruction of streets and walks. Prohibiting strangers and young boys from getting on or off the trains under certain conditions seems to us to be so closely related to the operation of trains as to be clearly embraced in the general subject. The purpose of the requirement that an ordinance shall contain but one subject is to prevent the practice of presenting in a single act subjects diverse in their nature with a view to effect a combination, "and thus secure the passage of several measures, no one of which would succeed upon its own merits." In *Dempsey v. Burlington*, *supra*, it was said that this provision does not forbid the enactment in a single ordinance of all the legislation which may be necessary to the accomplishment of a single object; and it was there held that an ordinance vacating an alley and granting the vacated land to a private person was not void under the statute. The same rule was announced in *State v. Wells*, 46 Iowa, 662, and in *Hanson v. Hunter*, 86 Iowa, 722. The ordinance in question here is well within the rule of the cited cases, and it was properly received in evidence.

Whether the train was running faster than six miles per hour when it struck the plaintiff, and whether signals were given of its approach to the crossing, are questions of fact which are rendered somewhat doubtful on account of the fact that the plaintiff was the only witness who testified that the train was going at a greater rate of speed than six miles per hour and that signals were not given, while five witnesses for the defendant contradicted him. There were, however, some undisputed conditions shown which tended to support the plaintiff's testimony as to the speed of the train. The plaintiff's testimony relative thereto was competent, and the credibility of all of the witnesses was a

2. RAILROADS:  
crossing acci-  
dent: negli-  
gence: evi-  
dence: ques-  
tion of fact.

question for the jury alone. The jury evidently believed the plaintiff, and under the well-settled rule of our cases we are not at liberty to say as a matter of law that the verdict is wrong.

The judgment is *affirmed*.

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SAM GIBSON, Complainant, v. WILLIAM HUTCHINSON,  
Judge of the District Court, Respondent.

**Contempt:** FORMER JEOPARDY. A prosecution for contempt is not  
1 a criminal proceeding in the sense that one discharged from liability in such a proceeding may not be again tried or punished for the same act.

**Same:** JUDGMENT: WHEN VOID. A judgment for contempt which  
2 is entered before the evidence upon which it is based has been filed, either by filing the shorthand notes or transcript of the same, is void.

THURSDAY, JUNE 16, 1910.

CERTIORARI proceedings instituted in this court to review the legality of the conviction of the defendant of contempt of court. The facts are stated in the opinion. Judgment of conviction *annulled*.

*T. P. Murphy* and *Wilbur Owen*, for complainant.

*John F. Joseph*, for respondent.

WEAVER, J.—Sam Gibson, complainant herein, was the keeper of a saloon in Sioux City, and prior to February 2, 1909, had been duly enjoined from the unlawful sale and keeping for sale of intoxicating liquors. On the date named an information was filed by one Sawyer charging him with a violation of the injunction. A hearing upon

said charge was had before the court on May 4, 1909, and an order entered finding that the charge of contempt was not sustained by the evidence and discharging the accused. On certiorari proceedings begun by the informant this court annulled and set aside said order of discharge. See *Sawyer v. Oliver*, 144 Iowa, 382. After the decision here referred to had been handed down, Gibson was re-arrested upon the original charge of contempt, and upon hearing before the district court, Hon. William Hutchinson, respondent herein, presiding, he was found guilty as charged and adjudged to pay a fine. To annul this order and fine the present proceedings in certiorari have been instituted. As entitling him to this relief, complainant relies upon two propositions:

I. He contends that a prosecution for contempt is a "criminal proceeding," and that the order of May 4, 1909, releasing him therefrom, is an acquittal which, under section 12, of article 1, of the Constitution of the state, relieves him from liability to be again tried or punished for the same act.

1. CONTEMPT:  
former  
jeopardy.

In the recent case of *Brown & Bennett v. Powers*, 146 Iowa, 729, we had occasion to consider this constitutional objection and held it not to be well taken. Without undertaking a discussion of the question, we have to say that we are still of the opinion there indicated. It is a well-settled proposition that while the proceedings to punish for contempt may in some features resemble hearings in criminal proceedings and judgment of fine and imprisonment may be entered, yet the object and purpose thereof is not to punish a public offense, but to compel obedience to and respect for the order of the court. The authority to so punish inheres in all the courts, whether with or without jurisdiction in criminal cases, and, if the act punished be both a crime against the laws of the state and a contempt of court, punishment for the latter has never been held to afford immunity against prosecution and punishment for

the former. The annulment of the order for Gibson's discharge did no more than to restore the contempt proceedings to the position they occupied before it was entered, and the district court was clearly within its authority and in the strict line of its duty in assuming jurisdiction to act without reference to such erroneous order.

II. Complainant further objects that the evidence upon which he was convicted of contempt was not taken down and filed as required by law. The statute upon the subject provides that before punishment for contempt the accused must be given opportunity to show cause against it, and in cases

2. SAME:  
judgment:  
when void.

where the action of the court is founded upon evidence of others it must be reduced to writing and filed and preserved. Code, sections 4465, 4466. To determine whether there was any material departure from the statutory rule, we must look to the respondent's return to the writ of certiorari. It is there certified that the hearing was had on February 21, 1910; that the proceedings were taken down in shorthand by the official reporter; that the order finding complainant guilty of contempt and adjudging him to pay a fine was entered March 3, 1910, and the shorthand notes of the proceedings were not filed until March 12, 1910. The case seems to be governed by the decision in *Walker v. Kennedy*, 133 Iowa, 284, and others of its class. That precedent is directly in point, in that upon a similar charge it was held that conviction must be annulled because of the failure to have the evidence either in shorthand or extended transcript filed of record until some time after the judgment assessing the punishment was entered. The same rule was announced in *Dorgan v. Granger*, 76 Iowa, 156. Were the question before us for the first time, some members of the court would be inclined to a more liberal construction of the statute upon this subject; but we are not disposed to create confusion in our cases by disapproving or overruling



the decisions referred to. With a very little care and watchfulness on part of counsel in such proceedings to have the evidence either in full transcript or shorthand notes duly certified and filed at the time of submission, such failures and delays of justice could not occur.

For the reason stated, the judgment assessing punishment against complainant will therefore be annulled, but without prejudice to the authority of the district court to resume jurisdiction of the contempt proceedings and to enter such judgment therein upon the evidence now of record and in harmony with the views herein expressed.—  
*Annulled.*

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JEANETTA WASSON V. THE AMERICAN PATRIOTS,  
Appellant.

**Trial:** CONTINUANCE: ABSENT WITNESS. Where the adverse party  
1 admits that an absent witness if present would testify to the matter stated in the affidavit for continuance, a continuance of the cause on the ground of absence of such witness should be denied.

**Same:** ABSENCE OF ATTORNEY: DISCRETION. Where the record of an  
2 application for continuance of a cause on the ground of absence of the party's regular and principal attorney in the case did not show that the attorney present was unprepared or unable to properly try the case, and it appeared that the attorney present had previously appeared in a suit on the same claim and had investigated the cause of action, refusal to grant the continuance was not an abuse of discretion.

**Beneficial insurance:** ACTION UPON CERTIFICATE: MONEY JUDGMENT.  
3 In a suit upon a beneficiary contract of insurance providing that the beneficiary shall receive an amount equal to the proceeds of one assessment, not however exceeding a stated sum, the beneficiary is entitled to a money judgment for such sum unless the association shows that an assessment will not yield that sum.

**Same:** DEDUCTIONS FROM FACE OF CERTIFICATE: BURDEN OF PROOF.  
4 Where a beneficial certificate of insurance provides that in the event of death the certificate shall be charged with the amount such member would pay during the expectancy of life as shown by the mortuary tables, and at the same rate of assessment as

previously paid, the beneficiary is entitled primarily to the face of the certificate subject to any charges that might be made against it; and it is incumbent upon the association to plead and prove the amount of such charges.

**Same: CHANGE IN BY-LAWS: EFFECT.** The rights of a beneficiary under a certificate of insurance can not be affected by a change in the by-laws made after his rights had accrued.

*Appeal from Dallas District Court.*—HON. EDMUND NICHOLS, Judge.

THURSDAY, JUNE 16, 1910.

SUIT on a benefit certificate. Judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*J. A. Merritt*, for appellant.

*Ira J. Bell, H. G. Giddings, and W. H. Winegar*, for appellee.

SHERWIN, J.—The plaintiff held a benefit certificate in the order of the Knights and Ladies of the Golden Precept until that order was consolidated with the appellant. In the consolidation of the two orders the appellant assumed the obligations of the former, but with the provision, however, that "each of said certificates shall be charged with the amount which each of said members would pay during his expectancy of life as shown by the American Experience Tables of Mortality based upon his age at the time of entry and shall be credited with all payments made by the member during the membership." The certificate issued to the plaintiff by the Knights and Ladies of the Golden Precept entitled her beneficiary to death benefits in the sum of \$1,000, and to one-half of that amount in case of total and permanent disability. The plaintiff pleaded total and permanent disability on

account of sickness. The appellant's answer admitted the issuance and assumption of the certificate, denied the disability alleged, and pleaded the provision for scaling the certificate. It also pleaded a provision of the certificate to the effect that no action except in equity should be maintained against the association to enforce any of the provisions of the contract.

The original petition was filed herein on the 2d day of February, 1909. This was assailed by various motions, and on the 19th day of March a substituted petition was filed. On the 25th day of March the defendant answered and on the same day filed a motion to transfer the cause to the equity docket for trial. This motion was overruled on the 1st day of April, and the cause was then assigned for trial on April 5th. April 2d the defendant filed a motion for a continuance over the term on account of the illness of one of the attorneys, filing therewith an affidavit of J. A. Merritt, who had been an attorney in the case since its inception, which alleged that Mr. Ira J. Bell, of Springfield, Ill., was the chairman of the defendant's law committee and its regular attorney and the principal attorney in the case; that said Bell was expected to try the case and had it in charge; and, further, that he was a material witness for the defendant.

A continuance was refused upon condition that plaintiff admit that Bell would testify as set forth in the affidavit, which admission was made, and the case proceeded to trial without the presence of Mr. Bell. We think there was no abuse of discretion in the order.

A suit on the same claim was brought a year before, and Mr. Merritt was the defendant's attorney of record therein. The facts in the case were evidently fully investigated by him at that time. Mr. Bell was also present and in consultation with Mr. Merritt, and their efforts in behalf of the

1. TRIAL: continuance: absent witness.

2. SAME: absence of attorney: discretion.

appellant resulted in a dismissal of the first suit. The affidavit of Mr. Merritt did not say that he was unprepared or unable to properly try the case without the presence and assistance of Mr. Bell, and the whole record shows that the case of the defendant was fully and ably presented by Mr. Merritt and his associate, Mr. D. H. Miller.

The motion to transfer to the equity docket because of the nature of the action was properly overruled. The contract does not provide that payment thereunder shall

3. BENEFICIAL  
INSURANCE:  
action upon  
certificate:  
money judgment.

be made from the proceeds of the assessment.

It says that "in the event of her death

. . . her beneficiary shall receive an

an amount equal to the mortuary proceeds of

one assessment not exceeding the sum of \$1,000." Under this contract the amount to be paid was \$1,000 unless an assessment would not yield that amount (*Thornburg v. Life Association*, 122 Iowa, 266) and the beneficiary is entitled to a money judgment, and for the amount named, unless the association shows that at the time of the death an assessment of its membership would not have yielded such sum (*Wood v. Farmers' L. Ass'n*, 121 Iowa, 44; *Hart v. Ass'n*, 105 Iowa, 717; *Thornburg v. Ass'n*, *supra*). The appellant makes no claim that the cause should have been transferred to equity because of the stipulation in the contract to which we have already referred.

The provision in the contract of assumption that the plaintiff's certificate shall be charged with the amount which each of the members would pay during his expectancy

4. SAME:  
deductions  
from face of  
certificate:  
burden of  
proof.

of life as shown by the mortuary tables was

pleaded by the defendant; but no proof seems to have been offered on the subject. Appellant now claims that it rested upon the plaintiff

to show the amount she would be entitled to under such scaling provision. By the terms of her contract with the appellant, she was to pay the same rates which she had theretofore paid, and it was only in case she did not live

out her expectancy of life that her certificate was to be charged with any amount. Primarily, she would be entitled to the face of the policy, and this amount could only be reduced or changed by proof that it fell under some exception to the rule. In other words, if a proper charge might be made against the certificate, it was incumbent upon the defendant to so plead and prove. The instant case is not similar to *Congower v. Ass'n*, 94 Iowa, 499, and is therefore not ruled by the holding there.

After the plaintiff had become disabled and made a claim for such disability, the defendant amended its by-laws by defining what "total disability" meant. The plaintiff's rights could not be affected by a change in by-laws after such rights had accrued. But the question does not seem to be a material one here, for under the instructions given there can be no complaint.

The evidence seems to support the verdict and the judgment should be *affirmed*.

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### STATE OF IOWA V. JOHN FLOOD, Appellant.

**Criminal law:** FORGERY: EVIDENCE: ALIBI. In this prosecution for  
 1 uttering as true a forged instrument the evidence is held insufficient to support the defense of alibi.

**Same:** EVIDENCE: ACT OF CO-CONSPIRATOR. Where there was evidence  
 2 tending to show a common plan and conspiracy between the defendant and another to pass as true a forged check, evidence that such other person had passed a similar check to another party was admissible as against defendant.

**Same:** HEARSAY EVIDENCE: REFUSAL TO STRIKE. On this prosecution  
 3 the state produced a witness on rebuttal for the purpose of showing that defendant's evidence of an alibi was untrue, and on cross-examination defendant developed the fact that the witness had verified her recollection of defendant's presence at her place on a certain date by conversation with another. *Held*, that de-

defendant's motion to strike the evidence as hearsay was properly overruled, especially as the recollection of the witness was not based entirely upon the statements of such other party.

*Appeal from Polk District Court.*—HON. JESSE A. MILLER,  
Judge.

THURSDAY, JULY 7, 1910.

THE defendant appeals from a conviction under an indictment charging him with uttering as true a forged instrument.—*Affirmed.*

*McHenry & Graham*, for appellant.

*H. W. Byers*, Attorney-General, *C. W. Lyon*, Assistant Attorney-General, and *Thos. J. Guthrie*, County Attorney, for the State.

McCLAIN, J.—The evidence for the prosecution tended to show that on March 13, 1909, the defendant offered as genuine to the Vim Company, a check on the People's Savings Bank, for \$7, purporting to be signed by the Des Moines Dye Works and indorsed by Frank Mead, and received the amount of money called for by such check. The evidence tended to show that the entire check with the indorsement was forged by the defendant in pursuance of a general plan and conspiracy between defendant and one Hartshorn to make and pass forged checks for small amounts for the purpose of obtaining money thereon.

I. Substantially the only question raised as to the sufficiency of the evidence to support a conviction was that arising on the credibility of the evidence of an alibi testified to by defendant's parents and sisters, with whom he resided as a member of the family. The testimony of these witnesses was in direct conflict with that of witnesses for the state,

1. CRIMINAL LAW:  
forgery:  
evidence:  
alibi.

who identified the defendant as the person passing the check, and it was also in conflict with the testimony of other witnesses for the state as to where defendant had been on two or three days preceding the passing of the check. In view of this conflict in the evidence, we cannot say that the jury was not fully justified in finding that the witnesses for defendant were mistaken as to the facts with reference to which they testified.

II. Over objection for the defendant, the prosecution was allowed to show that another check forged by defendant was passed by Hartshorn on another company. In view of the evidence tending to show a common plan and conspiracy between Hartshorn and defendant to pass forged checks, this evidence was admissible as against defendant. It is not necessary to cite authorities in support of the general proposition that, where the intent is material, other acts of the same character tending to show a common purpose and design to defraud may be proven, although such acts were committed by a co-conspirator. No authorities are cited for appellant sustaining the proposition made in his behalf, and we do not find it necessary to enter upon any elaboration in regard to a well-settled rule of evidence.

III. For the purpose of showing that the account given by defendant's witnesses of his whereabouts during the two or three days preceding the commission of the crime was untrue, a witness was called by the state in rebuttal who testified that defendant was at her home March 11th, at Norwalk, and that Hartshorn, who was with him, received a registered letter on that day. On cross-examination she testified that she had verified the date by inquiry at the post office as to the day when such registered letter was delivered. Counsel for defendant moved that the testimony of this witness as to what the postmaster said to her be stricken out as hearsay. But what the postmaster said

2. SAME:  
evidence:  
act of co-  
conspirator.

3. SAME: hear-  
say evidence:  
refusal to  
strike.

to her was called out on the cross-examination for defendant, and defendant was not entitled to have it stricken out on his own motion. It may be that, if the cross-examination showed that the only knowledge or recollection which the witness had as to the day on which defendant was at Norwalk depended upon this hearsay statement of the postmaster, the testimony of the witness in chief should have been withdrawn from the consideration of the jury. But no such motion as that was made, and, if it had been made, it should not have been sustained, for it appears from the record that the knowledge of the witness as to the date was not entirely dependent upon information communicated to her by the postmaster.

There was no error in refusing to strike out the testimony which had been given in response to defendant's own cross-examination.

There is no error in the record, and the judgment is *affirmed*.

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### STATE OF IOWA v. GUY BAKER, Appellant.

**Criminal law: BURGLARY: BREAKING AND ENTERING: EVIDENCE.** The  
1 crime of burglary may be committed although the purpose of breaking and entering was not accomplished. In this action the evidence is held to justify a finding that the purpose and intent of defendant in entering the building was burglary.

It is also held sufficient to sustain a finding that defendant broke and entered the building.

**Same: MISCONDUCT IN ARGUMENT.** In view of the evidence relating  
2 to the identity of defendant, and the evident purpose of counsel in referring to the same to impress upon the minds of the jury the fact that from the situation of the complaining witness she would be likely to be able to identify the defendant, the argument of counsel is held to have been without prejudice.

*'Appeal from Wapello District Court.—HON. FRANK W. EICHELBERGER, Judge.*



THURSDAY, JULY 7, 1910.

THE defendant appeals from a judgment convicting him of having committed the crime of burglary.—*Affirmed.*

A. W. Enoch, for appellant.

H. W. Byers, Attorney-General, and Chas. W. Lyon, Assistant Attorney-General, for the State.

LADD, J.—At 7:30 o'clock in the evening of October 25, 1909, Laura Stokes retired. Before leaving the room, her mother placed two \$10 and two \$5 bills in a paper box and put it beneath a mattress at the head of the bed, and then left the house. Laura fell asleep. She was awakened by somebody removing a ring from her finger. His warning was, "Don't hollo, or I will kill you." But she did hollo, though not loudly because scared, and he then found the box, removed the money therefrom, and, having covered her head with a pillow, took a vaseline bottle from a dresser. A brother was then heard to bid his wife goodnight, when the intruder threw the bottle at the lamp and ran. He fell, but escaped through the front door. The ring was found on the floor as was also a \$5 bill torn in two parts. A lamp was burning but turned half down, so that Laura positively identified defendant as the person whom she saw in her room. This he denied, but the evidence was such as to carry the issue of his identity as the person who seized the ring and money to the jury. In insisting that because of the money and ring having been dropped, the design to commit a public offense should not be inferred, appellant seems to have overlooked the rule that the crime of burglary may have been perpetrated without accomplishing the purpose had in breaking and entering. That the ring was removed and the box of money seized was enough

1. CRIMINAL LAW:  
burglary:  
breaking and  
entering:  
evidence.

to justify the inference by the jury that the intent in entering was to steal and no more was essential to conviction. Nor can it be said that there was no support in the evidence to the finding that the intruder "broke" into the house. None of the windows were found to have been disturbed, and Laura testified that she heard the door close when her mother left the house. From this it was to be inferred that, in entering, the door must have been opened. That others were at the house, or the door was left open sometimes, were facts for the consideration of the jury, but did not necessarily exact a conclusion other than that the perpetrator of the offense broke into the house by opening the door. It is said that the testimony that Laura heard the door close upon the departure of her mother was not competent, but no reason therefor is assigned. It was of a fact, and the circumstance that it was ascertained through the sense of hearing instead of sight can make no difference in the matter of proof. The accused was fifty-one years old, and appears to have been regarded by those who had employed him as honest. This was a circumstance entitled to consideration, but not controlling, if the jury believed him guilty, especially in view of his habits of intoxication and others. It is enough to say, without reviewing the evidence further, that it was such as to preclude any interference by us with the verdict.

II. In the course of his argument to the jury, the county attorney alluded to the round ball on the end of the accused's nose, hinting that the jury might know what caused it to blossom there, and proceeded:

2. SAME:  
misconduct  
in argument.

"If this man came to your bed at night-time, and you are probably dreaming of happy things, and you would be rudely awakened and see this man with the ball on the end of his nose at your bedside, pointing a gun at you, you would be badly scared, and there is none of you that would forget that picture." Laura Stokes had testified that the man in her room had an "ugly

big nose with a ball right on the end of it;" and she had identified defendant thereby in part at least. She also testified that he had something in his hand, but could not tell whether it was a gun. In view of the evidence of his habits no vindication of the right of allusion in argument to the accused's nose and the cause of its condition is essential. Nor do we think that portion of the argument quoted open to criticism. No claim was made that defendant had a gun. The evident design of counsel in what he said was to impress on the minds of the jury that the situation of Laura Stokes was such that she would be likely to remember the features of the person removing the ring from her finger.

Some complaint is made of the instructions, but, as none of these are set out, exceptions thereto can not be considered.—*Affirmed.*

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STATE OF IOWA V. GEORGE GREGORY, Appellant.

**Criminal law: COMPETENCY OF WITNESS: DISCRETION.** The competency  
1 of a child as a witness is a matter largely within the discretion  
of the trial court, and unless abuse is shown its determination  
of the question will not be disturbed on appeal.

**Same: EVIDENCE OF MORAL CHARACTER.** Under the statute the gen-  
2 eral moral character of a witness may be shown as bearing upon  
his credibility; and while the term "character" as used in the  
statute is equivalent to the term "general reputation;" still it is  
the general moral character of the witness which may be in-  
quired into and not his general reputation unconnected with the  
question of moral character.

*Appeal from Polk District Court.*—HON. JAMES A. HOWE,  
Judge.

THURSDAY, JULY 7, 1910.

DEFENDANT was indicted for the crime of rape. Upon

trial to a jury he was convicted of an assault with intent to commit rape, and appeals.—*Affirmed.*

*S. B. Allen*, for appellant.

*H. W. Byers*, Attorney-General, and *Chas. W. Lyon*, Assistant Attorney-General, for the State.

DEEMER, C. J.—Defendant is accused of having committed the crime of rape upon the prosecuting witness, Edith Otto, a girl under the age of fifteen years. Three matters are relied upon for a reversal:

First. It is insisted that two of the state's witnesses were so young and immature that their testimony should not have been received. One of these witnesses was thirteen and the other eleven years of age.

1. CRIMINAL LAW: competency of witness: discretion. Both the county attorney and the presiding judge examined these witnesses as to competency and the trial court concluded that their testimony should be admitted. In this there was no error. In such matters the trial court has a large discretion, and there was no abuse thereof in this case. *State v. Todd*, 110 Iowa, 631; *State v. Crouch*, 130 Iowa, 478; *State v. Meyer*, 135 Iowa, 507.

Second. It is argued that there is not sufficient corroborating testimony tending to connect defendant with the commission of the offense. In our opinion there was ample—rather more than is usual in such cases. For obvious reasons, there is no need for setting it out *in extenso*.

Third. Edith Otto was a witness for the state, and, in order to impeach her, the defendant produced a witness to whom the following questions were propounded: "Do you know what the general reputation of Edith Otto is in the neighborhood where she resides as to her character or was in

2. SAME: evidence of moral character.

March, 1909? (Objected to as incompetent, irrelevant, immaterial and improper in form. Sustained. Defendant excepted.) Do you know what the general reputation of Edith Otto in the neighborhood where she resides is as to her character? (Objected to as incompetent, irrelevant, immaterial and improper. Sustained and excepted to by the defendant.) Do you know what the general reputation of Edith Otto was about March 3, 1909, in the neighborhood where she resided at that time? (Objected to as incompetent, irrelevant, immaterial and improper. Sustained and excepted to by the defendant.)” The trial court made rulings on objections thereto as shown.

Section 4614 of the Code provides: “The general moral character of a witness may be proved for the purpose of testing his credibility.” Character as referred to in this section has been held to be the equivalent of general reputation. *State v. Egan*, 59 Iowa, 636; *State v. Seevers*, 108 Iowa, 738, and cases cited; *State v. Haupt*, 126 Iowa, 152. However, it is the moral character of the witness and not his character as to truth and veracity, or character as to being peaceable and law abiding. *State v. Seevers*, 108 Iowa, 738. Moreover, it is not some specific vice which may be shown. *Kilburn v. Mullen*, 22 Iowa, 498. The questions asked were not confined to general moral character, and for that reason the trial court did not err in sustaining objections thereto.

No prejudicial error appears, and the judgment must be, and it is, *affirmed*.

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INDEPENDENT SCHOOL DISTRICT No. 5 OF BIG GROVE  
TOWNSHIP, Appellant, v. SOLON, IOWA, INDEPENDENT  
SCHOOL DISTRICT No. 8.

**Pleadings:** FAILURE TO ANSWER INTERROGATORIES: JUDGMENT. A plaintiff is not entitled to judgment upon a failure to answer interrogatories attached to the petition, where, although the answers

might tend to sustain plaintiff's claim, they would not necessarily prove the amount which he was entitled to recover.

**Same:** INTERROGATORIES: SUFFICIENCY OF AFFIDAVIT. Under the statute providing that a party may file interrogatories with his pleading, the affidavit to the effect that he believes the subject inquired about is within the personal knowledge of the party interrogated, which does not aver that affiant has a personal knowledge of the matter sworn to, when made by an attorney, is insufficient.

**Same:** EXTENSION OF TIME TO ANSWER INTERROGATORIES: DISCRETION. While it is incumbent upon a party to answer interrogatories attached to a pleading within the time required to answer the pleading itself, the time may be extended by the court, and the order of extension will not be reversed unless it clearly appears there was an abuse of discretion.

*Appeal from Johnson District Court.*—HON. R. P.  
HOWELL, Judge.

WEDNESDAY, MARCH 9, 1910.

THE opinion states the facts and case.—*Affirmed.*

*Holbert & Kimball*, for appellant.

*Wade, Dutcher & Davis*, for appellee.

SHERWIN, J.—The plaintiff sued the defendant to recover money alleged to have been demanded and paid under a mistake. The original petition was filed August 30, 1907, and in January, 1908, and again in November of the same year, amended and substituted petitions were filed. It does not appear whether the defendant pleaded to the first two petitions. Certain interrogatories for the defendant to answer were annexed to the last substituted petition, as provided by section 3604 of the Code. Still later the plaintiff filed an affidavit in which it attempted to comply with the provisions of section 3610 of the Code. On February 2, 1909, the interrogatories not having been

answered, the district court by proper order extended the time for answering the same ten days. No answer was made within the extended time, and on the 26th of February the plaintiff filed a motion for a judgment under section 3610. No ruling was made on this motion at that time, and on March 6th the defendant asked further time within which to answer the interrogatories. A resistance to this motion was filed on the 16th of March. On the 19th of April the court overruled the plaintiff's motion for a judgment, and gave the defendant five days from that time for answering the interrogatories. On the 21st of April the defendant filed answers to the interrogatories, and on the same day the plaintiff appealed from the order overruling its motion for judgment.

The plaintiff was not entitled to a judgment on its motion. The petition in its several counts alleged that the plaintiff had paid to the defendant during a period covering several years specific sums for the tuition of school children who were supposed to belong to the plaintiff district when in fact they belonged to the defendant district. The interrogatories asked the defendant to state whether it had a record of the children treated as coming from plaintiff district and for whose instruction it had charged plaintiff; and further, whether during the years in question there were any children belonging to plaintiff district who were furnished tuition by defendant, for which the plaintiff paid, and what part of the tuition thus paid was for children living outside of the defendant district. If it were to be conceded that answers to the interrogatories would tend to sustain the plaintiff's claim, it still remains true that they would not necessarily from the very nature of the interrogatories prove the entire claim of the plaintiff or the amount for which it might be entitled to judgment. It had pleaded that a specific sum was paid to the defendant each year, and the total of such sum was the amount for which it asked judgment on the motion. In *Perry v.*

*Heighton*, 26 Iowa, 451, it was held that the section of the Code under consideration establishes a rule of evidence only, and that a failure to answer the interrogatories, even where there is the prescribed affidavit, does not entitle the party to a judgment without a trial, or deny the other side the right to a jury trial. Furthermore, the affidavit filed with the interrogatories was made by one of the plaintiff's counsel, and there is no averment therein that he had personal knowledge of matters sworn to. The statute says that such an affidavit may be made by the party himself. But, if it may be construed to permit it to be made by a stranger to the litigation, he should at least aver his knowledge of the matters he swears to.

While it was incumbent on the defendant to answer the interrogatories within the time that it was required to answer the pleading, such time for answering might be extended by the court, as was done here, and its order of extension will not be reversed unless it clearly appears that there was an abuse of discretion. The parties on both sides were going an easy gait, and the extension of time five days could not have been prejudicial to the defendant, even if he had then demanded an immediate trial of his action. The order is *affirmed*.

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NATIONAL SURETY COMPANY, Appellee, v. W. WALKER,  
M. A. WALKER, and D. J. VAN LIEW, Appellants.

**Mortgages: FORECLOSURE: PURCHASE OF TAX TITLE BY MORTGAGOR:**

- 1 **VALIDITY OF SUCH TITLE.** In this suit to foreclose a mortgage the holder of a tax title who was made defendant and claimed title to the mortgaged property under a tax deed, asked that his title be quieted against plaintiff and also against the mortgagors, who denied the validity of the mortgage. The judgment of foreclosure and sale was reversed on appeal and pending the appeal the property was sold for taxes, the plaintiff acquiring a tax title. *Held*, that it was plaintiff's duty to pay the taxes on the



property during the time the judgment of foreclosure remained unreversed, and that it could not acquire a tax title through a sale or by purchase of a tax sale certificate while insisting upon title under the foreclosure; that such transaction amounted to a payment of the taxes or a redemption from the tax sale and could not be made the basis of an independent title against the defendants, under the rule that one in possession of real property or whose duty it is to pay the taxes can not acquire a tax title which will defeat a conflicting claimant or lienholder.

**Same: RESTITUTION OF PROPERTY: ACCOUNTING.** It is also held that  
2 as the original tax title holder, who was made a defendant and answered claiming title under the tax deed and by cross-petition asked that his title be quieted against plaintiff and against his co-defendants, the mortgagors, was entitled to a restitution of the property, or in case this could not be done to a judgment for its value; and that plaintiff is entitled to reimbursement for the amount paid by it for the tax certificate, not exceeding the amount it would have been obliged to pay to redeem, and also to credit for taxes paid and the amount expended for repairs or improvement of the property including insurance, and is chargeable with the rents and profits.  
McClain and Evans, JJ., dissenting.

*Appeal from O'Brien District Court.*—HON. WM. HUTCHINSON, Judge.

MONDAY, MARCH 14, 1910.

ACTION originally brought to foreclose a mortgage. Judgment was finally entered quieting title in plaintiff to the premises covered by the mortgage as against a claim of defendants interposed by amended answer, asking that a tax title held by plaintiff on the property covered by the mortgage be canceled, and denying relief to defendants under a counterclaim for damages. From this judgment, defendants appeal. *Reversed and remanded.*

*Read & Read*, for appellants.

*Henry & Henry*, for appellee.

DEEMER, C. J.—This action was originally instituted in 1902, to foreclose a mortgage on certain real estate in O'Brien county belonging to Mary A. Walker; the mortgages having been given by her and her husband, Warren Walker, to secure payment of their joint promissory note. Van Liew was made defendant as the holder of an alleged tax title. In this action a decree of foreclosure was entered by the district court of O'Brien county in which any right or interest held by defendant Van Liew in the premises was found to be subject to plaintiff's right under its mortgage. There was an appeal from this judgment, and it was reversed. See *National Surety Co. v. Walker*, 127 Iowa, 518. In the meantime no supersedeas bond having been given, there had been a foreclosure sale of the property, and it had been bought in by plaintiff as execution creditor for \$600, plaintiff satisfying the costs and giving the Walkers credit on the judgment against them for the balance, and a sheriff's deed had been issued to plaintiff. On a remand of the case to the lower court after reversal, Van Liew and the Walkers by amendment to their answers asked judgment against plaintiff in the amount of \$600 as improperly received by plaintiff under its foreclosure sale, and further charged that plaintiff and its attorneys had conspired with other parties to wrong, cheat, and defraud defendants out of the mortgaged property, to the damage of defendants in a further sum. The plaintiff in reply confessed that it acquired no title under the sheriff's deed, but set up a title to the premises under a tax deed, and defendants, by further answer, attacked this tax deed, alleging that plaintiff was estopped from claiming title to the property under such deed, and that the deed was obtained by fraud and collusion. The court entered a decree setting aside the sheriff's sale under the original decree, and declaring the sheriff's deed to be null and void, but further found that plaintiff was the absolute and unqualified owner of the property in question under

and by virtue of the tax deed, and quieted the title of plaintiff under such deed as against any claims of the defendants. Defendant Van Liew filed an answer in which, among other things, he claimed title to the mortgaged property under and by virtue of a tax deed, and by way of cross-petition asked that his title be quieted against the plaintiff and also against his codefendants, the Walkers.

Plaintiff's tax title was acquired through a sale for taxes made subsequent to the sale to Van Liew. Van Liew also joined with his codefendants in their claim for a restitution of the property and for damages.

1. MORTGAGES:  
foreclosure:  
purchase of  
tax title by  
mortgagor:  
validity of  
such title.

Upon the reversal of the original foreclosure case either the defendant Walker or Van Liew was entitled to a restitution of the property, with rents and profits secured by plaintiff, less taxes, improvements, etc., unless it be held, as contended for the surety company, that its tax title gave it a prior right and title to that held by either the Walkers or Van Liew. Code, section 4145; *Munson v. Plummer*, 58 Iowa, 736; *Zimmerman v. Bank*, 56 Iowa, 133; *Schoonover v. Osborne*, 117 Iowa, 427. The decree under which the foreclosure was had was adhered to and insisted upon down to the time of the reversal in this court, and was unquestionably valid until reversed by this court. Until reversal it was the duty of the surety company, which had acquired the legal title to the property in virtue of the sheriff's deed, to pay the taxes. The acquisition of the title through a tax sale or by the purchase of a certificate of tax sale from another was nothing more than the payment of the taxes or a redemption from the sale, and can not be made the basis of an independent title against either of the defendants. *Doud v. Blood*, 89 Iowa, 237; *Hunt v. Rowland*, 22 Iowa, 53.

In the former case it is said:

The defendants claim title to the land as against the

plaintiff's mortgage because of the tax deed to Adams. It is true that the said Emeline Campbell claims title under subsequent tax sales. But these sales and deeds were made at a time when she was under a legal obligation to pay the taxes, and can not be allowed to affect her title under the tax deed to Adams and the conveyances from Blood. There is enough in this case which requires consideration without elaborating the principle just stated, which is one of the elementary doctrines pertaining to tax titles. Without stating all of the facts, it is enough to say that the defendants, when they secured tax titles subsequent to acquiring the title under Adams and the quit-claims under Blood, were merely paying their own taxes

. . . A certificate of purchase at tax sale in the hands of an assignee is chargeable with all the infirmities that would affect it in the possession of the original holder. *Besore v. Dosh*, 43 Iowa, 211. The original holders of these tax certificates had sold them to Blood, and this operated as a redemption of the land from the tax sale. *Bowman v. Eckstein*, 46 Iowa, 583; *Burns v. Byrne*, 45 Iowa, 285; *Hunt v. Seymour*, 76 Iowa, 751. The certificates were of no more avail in the way of conferring a right on Clarke or Adams to a tax deed than if they had been blank paper.

In the *Hunt* case, this court said:

As the vendee took possession, however, and enjoyed the rents and profits, the rule settled in *Miller v. Corey*, 15 Iowa, 166, would, as between him and his vendor, make him liable. Being thus liable, being bound upon legal and equitable principles, though not by express covenant, to keep down the incumbrances, he could not acquire a title against the vendor, by suffering the land to go to sale, and bidding it in for the taxes. Not only so, but as vendee he could not acquire a title adverse to his vendor by a purchase at tax sale. These rules are well settled, as will be seen by the following, among other cases: *Voris v. Thomas*, 12 Ill. 442; *Glancy v. Elliott*, 14 Ill. 456; *Willard v. Strong*, 14 Vt. 532 (39 Am. Dec. 240); *Blake v. Howe*, 1 Aikens (Vt.) 306 (15 Am. Dec. 681); *Douglas v. Dangerfield*, 10 Ohio, 152; *Ballance v. Forsyth*, 13 How. 18 (14 L. Ed. 32); *Blackwell on Tax Titles*, 470-2.

The land however in this case, was bought, not in the name of the vendee, nor by one under any covenant to keep down the incumbrances. And yet the testimony satisfies us that he combined with the vendee, or those in possession, to thus acquire the title and defeat that of the vendor; or, if not to defeat his title, to get it into his hands for the benefit of the family, rather than to let it be bought in by some stranger. . . . In view of his relation to the parties and the circumstances of the purchase, we could not, consistent with principle, allow the title to prevail. It is certain that plaintiff settled with Mrs. Hopkinson after the purchase, entered into possession and procured the rescission of the contract, with the belief that she had no further claim upon the land. It is worth very largely more than the tax incumbrance. It would be paying a premium for fraud to allow plaintiff's title to be thus divested..

The settled rule for this state is that one in possession of real estate or whose duty it is to pay the taxes can not acquire by tax deed a title which will defeat a conflicting claimant or lienholder. *Anson v. Anson*, 20 Iowa, 56; *Stears v. Hollenbeck*, 38 Iowa, 550; *Curtis v. Smith*, 42 Iowa, 665; *Seymour v. Harrison*, 85 Iowa, 130-133; *Hunt v. Rowland*, 22 Iowa, 53; *Thomas v. Stickle*, 32 Iowa, 71; *Manning v. Bonard*, 87 Iowa, 648; *Fair v. Brown*, 40 Iowa, 209; *Eck v. Swennumson*, 73 Iowa, 423; *Dayton v. Rice*, 47 Iowa, 429; *Lillie v. Case*, 54 Iowa, 177; *Cone v. Wood*, 108 Iowa, 260; *Busch v. Hall*, 119 Iowa, 279; *First Con. Church v. Terry*, 130 Iowa, 513.

In *Terry's* case, 130 Iowa, 513, it is said:

The rule that the life tenant of lands is charged with the duty of paying the taxes which accrue upon the property of which he is enjoying the use, rents and profits is elementary. *Olleman v. Kelgore*, 52 Iowa, 38; *Booth v. Booth*, 114 Iowa, 78; *Defreese v. Lake*, 109 Mich. 415 (67 N. W. 505, 32 L. R. A. 744, 63 Am. St. Rep. 584); *Trust Co. v. Mintzer*, 65 Minn. 124 (67 N. W. 657, 32 L. R. A. 756, 60 Am. St. Rep. 444). It is equally well

settled that with this duty resting upon him he can not cut out or destroy the estate of the remaindermen in the property by permitting it to be sold for taxes and taking to himself the title thus accruing. *Cooley on Taxation* (2d Ed.) 467; *Crawford v. Meis*, 123 Iowa, 610. This being true, it is immaterial whether he takes the tax title direct or by conveyance from some third person who has acquired it. In neither case can he assert such title against the owners of the remainder, and his purchase will be held to operate as a mere redemption from the tax sale or payment of the taxes for which he was legally liable. Such would also be the necessary effect of a tax title taken by his procurement or for his use and benefit in the name of some other person. . . . It is a general and just doctrine that a person having such an interest in land as would entitle him to redeem from tax sale can not, by taking a tax title, eliminate the rights of others jointly interested with him in such property. *Lane v. Wright*, 121 Iowa, 376; *Cowdry v. Cuthbert*, 71 Iowa, 733; *Garrettson v. Scofield*, 44 Iowa, 37; *Manning v. Bonard*, 87 Iowa, 648. That the wife has an interest in the homestead which she is entitled to protect by redeeming from tax sale, there can be no room for doubt.

In *Dayton's* case, 47 Iowa, it is said:

As between W. S. Rice, the mortgagor, and plaintiff, the mortgagee, the primary duty of paying this tax rested upon the mortgagor. He remained in possession of the property, and it was his duty to keep the taxes paid. So long as the relation of mortgagor and mortgagee continued, this obligation rested upon the mortgagor. It is true the mortgagee might have paid the taxes for the preservation of his security; but if he had done so his claim against the mortgagor would have been, to the extent of the payment, increased. The duty of paying the taxes thus resting upon the mortgagor, he could not set up a title having its origin in a failure to perform this duty, as against the mortgagee. (See *Porter v. Lafferty*, 33 Iowa, 254.) But it is claimed that the relations of these parties are entirely changed by the fact that the lands had been sold for taxes when the sheriff's sale under which plaintiff claims was made. The tax sale was made in October, 1871, and the treasurer's

deed was executed in October, 1874. The sheriff's sale was made subject to redemption on the 2d day of May, 1874. Plaintiff was not entitled to a sheriff's deed until the 2d day of May, 1875. The mortgagor still retained the right to possession, and the right to redeem from the sheriff's sale, and this right continued until six months after the Patrick deed was executed. During all this time the primary obligation of paying these taxes rested on W. S. Rice. If plaintiff had redeemed for the purpose of preserving his security, Rice might have redeemed from plaintiff at any time before he was entitled to a sheriff's deed, by paying the original debt, with the taxes added. When, therefore, the property was purchased at the sheriff's sale, plaintiff had a right to suppose that Rice would remove the incumbrance growing out of unpaid taxes, as it was his duty to do. The purchasing in of the outstanding tax title from Patrick by Rice, whilst his right to redeem from the sheriff's sale existed, should be regarded in equity as a mere discharge of his obligation to redeem from the tax sale. We feel quite well satisfied that he ought not to be permitted to set up the title thus acquired in opposition to the title acquired by plaintiff through the foreclosure of his mortgage, and the purchase at the sheriff's sale thereunder.

In *Fair's* case, 40 Iowa, 209, it is said:

The question presented for our determination is this: May one incumbrancer defeat the lien of another by acquiring a tax title upon the land bound by the lien of each? A mortgagor, or one claiming title under him, can not defeat the lien of the mortgagee by acquiring a tax title upon the land. *Porter v. Lafferty*, 33 Iowa, 254; *Stears, Administrator, v. Hollenbeck*, 38 Iowa, 550. The rule, in these cases, is based upon the obligation of the mortgagor, or the party claiming under him, to pay the taxes; therefore the act of the party acquiring title through his own default is held to be fraudulent. In the case before us no such obligation rested upon defendant, for he was simply a lienholder, and was bound neither by the law nor contract to pay the taxes which were the foundation of his tax title. But in another view his act is fraudulent against the plaintiff and the mortgagor. The land is a common

fund for the payment of plaintiff's mortgage and defendant's liens. Defendant was authorized to redeem from the tax sale. *Rice v. Nelson*, 27 Iowa, 148. Equity will not permit him to acquire the title for an inconsiderable sum when he was authorized to remove the trifling incumbrance by redemption. Though not bound to pay the tax, yet it was his right to do so to protect his own liens. He can not obtain that protection by pursuing a course that will deprive the mortgagee of his security and leave the mortgagor to sustain the weight of the liens, which are personal judgments, after being deprived of his property by tax title. Equity will relieve against such oppression, and teach the grasping creditor moderation in his demands, and that he can not destroy others to build up his own fortunes.

In *Eck v. Swennumson*, 73 Iowa, 423, the court said:

It will be observed that S. Swennumson was the owner of the mortgage when he bid in the premises at tax sale, and that he still held the certificates of purchase when he assigned the judgment of foreclosure to plaintiff. One of the grounds upon which plaintiff demands relief against the tax deed is that, as Swennumson had the right to pay the taxes for the protection of his security, his purchase at the tax sale should be regarded merely as a payment of them, made for that purpose, and consequently neither he, nor any person holding under him, could acquire title under the certificates; and we think this position should be sustained. It was held in *Fair v. Brown*, 40 Iowa, 209, and *Garrettson v. Scofield*, 44 Iowa, 35, that a junior mortgagee can not, by bidding the property in at tax sale, acquire title, and thereby defeat the senior mortgage; and in the former case it is said that he can not by that means acquire title as against the mortgagor. The ground of the holding is that, as the party had the right to pay the taxes for the protection of his security, it would be inequitable to permit him to acquire title by purchasing the property for the delinquent taxes, and thereby defeat the lien of the senior mortgage, and cast upon the mortgagor the weight of both his own and the senior lien. Plaintiff's equities are equally as strong as would be those in favor of a senior mortgagee or the mortgagor. He in fact stands



in the place of the latter, for by his purchase under the foreclosure he acquired all his estate and rights in the land.

*Cone v. Wood*, 108 Iowa, 260, extends the rule here announced. Further quotation from the authorities is unnecessary. From the quotations already made it is apparent that so long as plaintiff claimed under its mortgage, or in virtue of the foreclosure sale of the property, it had the right and it was its duty to pay the taxes and it could not, while insisting upon its mortgage or a title acquired thereunder, obtain a tax title either against the mortgagors or any other holder of a title or lien upon the property. Had plaintiff waived its mortgage or done any other act showing an abandonment thereof before acquiring the tax title, another rule might perhaps obtain, as in *Curtis v. Smith*, *supra*; but at the time it acquired its tax title it was insisting both in the lower court and here that its mortgage and the sale under the foreclosure decree were valid. In such circumstances it could not acquire a tax title. In *Garrettson v. Scofield*, 44 Iowa, 35, it is said:

The defendant, Scofield, and the plaintiff were both mortgagees, and both claiming interests in the land to the extent of their respective mortgages, and while it is true there was no absolute duty resting upon either to pay the taxes, yet they had such an interest in the land as to make it necessary to do so in order to properly protect the title. Under these circumstances we do not believe that payment of the taxes by either at tax sale should entitle him to the statute penalties. See *Fair v. Brown*, 40 Iowa, 209. Scofield having taken the junior mortgage for a large amount, such as we are bound to believe, from subsequent events, it was not expected Whitstine or his grantee would pay; his relation to the plaintiff in this case is more in the nature of a subsequent purchaser from Whitstine than that of a stranger purchasing at tax sale. At least both were the holders of liens and the payment of taxes was necessary to protect the title.

It may be that the Walkers lost their title through

the tax deed to Van Liew; but Van Liew is in the case setting up his tax deed and joining with the Walkers in the relief asked. He at least is entitled to restitution and an accounting. It must be remembered in this connection that plaintiff obtained its tax deed on April 28, 1903, while the case was pending in this court on appeal and at a time when there was a decree in its favor holding its mortgage good and superior to any claims on the part of defendant Van Liew, and a decree ordering the property sold to pay the judgment upon the mortgage. The property was sold at foreclosure sale December 20, 1902, and the sheriff's deed was executed one year thereafter. If Van Liew were not in the case, and the Walkers were alone making defense, it may be that they should not be heard for the reason that they had lost their title through the tax sale to Van Liew. But as he is here insisting upon his title he is entitled to protection. Plaintiff relies upon an alleged adjudication of the matter at issue in an action between the parties in the district court of Polk county. There is no proper proof of any such judgment or decree as determines the issues in the case. Appellees further claim that Van Liew has never made any attack upon their tax title, and that if he had done so he is in no position to question it because he did not show title at the time of the sale under which plaintiff claims, or that the taxes due upon the property have been paid as required by section 1445. It is to be observed, however, that Van Liew was made a party defendant to both the original foreclosure proceedings and to the amended petition filed after the remand to the district court. In that amended petition plaintiff was claiming under a tax title and was asking that Van Liew's title under a prior tax deed be held for naught. Van Liew set up his tax title in defense and asked a restitution of the property sold under a decree which had been reversed. Having been made a defendant, and showing a

tax deed for the property prior to that asserted by the plaintiff, Van Liew was not required to do more than show the invalidity of plaintiff's tax deed. In *Adams v. Burdick*, 68 Iowa, 666, it is said: "A defendant who has a right to demand from plaintiff the payment of taxes which it claimed are unpaid must raise the objection that it does not appear that all the taxes due upon the property have been paid, by demurrer, or such objection will be deemed waived." No demurrer was filed to Van Liew's answer and cross-petition, raising the question now presented. Moreover, it sufficiently appears that all taxes were paid when defendant Van Liew filed his answer and counterclaim. This was sufficient in any event. *Lynn v. Morse*, 76 Iowa, 665.

Lastly it is claimed that defendant Van Liew does not tender an issue as to the validity of plaintiff's tax deed. We think this issue was tendered by a motion to strike, by an answer to plaintiff's amended petition and by a demurrer to plaintiff's reply to this answer. The results of these findings are that plaintiff's tax deed is declared invalid, that defendant Van Liew is entitled to a restitution of the property sold at foreclosure sale, or if that can not be had then a judgment for the value thereof, that plaintiff is entitled to reimbursement for the amount paid out for the assignment of the tax certificate, provided this amounts to no more than it would have been obliged to pay had it duly redeemed. Plaintiff is also entitled to credit for the amount expended to repair or for improvements upon the property, including insurance, if any, paid, and it should be charged with all the rents and profits thereof. The testimony is not sufficiently definite for us to make the computation, and the case will be remanded for such an accounting and for a final decree in harmony with this opinion. *Reversed and remanded.*

McCLAIN, J. (dissenting).—The controlling ultimate

facts, as it seems to me, are these: The note and mortgage on which suit was originally brought by plaintiff against Warren Walker were wholly invalid when plaintiff took them by assignment; and therefore plaintiff never had any lien upon nor interest in the property in controversy. *National Surety Co. v. Walker*, 127 Iowa, 518. Van Liew, who was made defendant because he held a tax deed on the property, was so holding adverse to plaintiff and to Walker, for a tax title is in its nature original and not derivative. *Lucas v. Purdy*, 142 Iowa, 359. Whatever reason there may have been for asserting that Van Liew's claim was inferior to the assumed lien of plaintiff was shown not to exist when it was decided that the mortgage held by plaintiff was invalid. So far as the record shows, Van Liew's tax title was in its inception, and continues to be a hostile title as against plaintiff and also as against Walker and those claiming under him. Why it should be assumed in the majority opinion that Van Liew became entitled to restitution from plaintiff when the execution sale in the foreclosure proceeding was set aside, I am unable to understand. Van Liew's tax title, if any he had was still good; and it does not appear that he became subrogated to or acquired in any other way the right of Walker to restitution from plaintiff. How then can it be that, as the majority holds, Van Liew is entitled to restitution from plaintiff?

When plaintiff acquired its tax title Van Liew's tax title was outstanding, and hostile. Can it be true that one who claims title to or a lien upon property which has been bought in by a stranger to the title at tax sale can not, at a subsequent tax sale, acquire a new and independent tax title? None of the cases cited by the majority announce any such doctrine. The holder of a tax title is not a lienholder, nor an owner in common. As to him the original owner or one claiming under the same chain of title as the owner owes no duty to pay the taxes. The

tax title holder and he alone, so far as his title is concerned, has the burden of protecting such title against subsequent sales for taxes. This proposition seems to me so elementary that citation of authorities ought to be unnecessary; but it is fully supported in principle by the following cases, which speak for themselves: *Curtis v. Smith*, 42 Iowa, 665; *Mallory v. French*, 44 Iowa, 133; *Neal v. Frazier*, 63 Iowa, 451; *Griffin v. Turner*, 75 Iowa, 250.

In my judgment Van Liew is entitled to no relief as against the tax title acquired by plaintiff.

EVANS, J., concurs in the dissent.

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A. A. RAKE & SON v. CENTURY FIRE INSURANCE COMPANY, Appellant.

**Insurance:** CHANGE IN APPLICATION: WAIVER OF CONDITIONS. An insured has the right to assume that the company will not change his application for insurance or issue a policy not in accordance therewith. So that where the company altered the application after it had been signed by the insured and without his knowledge, and without calling his attention to the change, and the policy was delivered with the statement of the company that it was written in compliance with the application, such assurance was a waiver of any agreement that the insured would notify the company if the policy was not right.

*Appeal from Winnebago District Court.*—HON. J. F. CLYDE, Judge.

MONDAY, MARCH 14, 1910.

ACTION in equity to reform a contract of insurance and for judgment thereon when so reformed. Decree for the plaintiff. The defendant appeals.—*Affirmed.*

*Read & Read*, for appellant.

*Gordon & Belsheim*, and *Dunn & Carlson*, for appellee.

SHERWIN, J.—In March, 1905, the defendant insured the plaintiff, a copartnership, in the sum of \$3,000 on its stock of general merchandise. The policy permitted concurrent insurance in the sum of \$3,000, and provided that the contract should be void if the insured procured other insurance not therein authorized. The plaintiff thereafter procured additional insurance for an amount in excess of \$3,000 and at the time of the loss still carried same. The defendant refused to pay because of such additional insurance, and thereupon the plaintiff brought this suit in equity alleging that the written application when signed by the plaintiff provided for other concurrent insurance without limit, and that, when the policy was delivered to plaintiff, the defendant's agent who made the delivery stated that it was written in conformity to the application.

The application for this insurance was written and was signed by a member of the plaintiff firm, A. A. Rake. He testified that he and the agent talked about concurrent insurance, and that it was finally agreed that the blank in answer to question 27, should be left unfilled, so that the application would read: "Other insurance concurrent herewith, permitted." The policy was written in the home office in Des Moines, and, when it was delivered to the plaintiff, there was attached to it what purported to be a copy of the application in which it was stated, "\$3,000 other insurance concurrent herewith, permitted." There was also attached to the policy a policy form, or rider, which contained the same limitation. The agent who took the application and who prepared it for the plaintiff's signature testified that concurrent insurance was discussed by him and Mr. Rake, and that it was agreed that it might be taken by the plaintiff. He said, however, that he could

not remember the amount that was agreed upon or what, if anything, was said about it in the application. He was sure that he did not agree to unlimited concurrent insurance. When the application reached the home office in Des Moines, it did not meet the views of the defendant's president, and he ordered it changed; and it was changed by inserting the figures "\$3,000" just in front of the words, "Other insurance concurrent herewith, permitted." Where these figures were inserted, an erasure was made of some word that had evidently been previously written in ink but what it was the record does not show with any degree of certainty. The agent who took the application testified that he filled out and attached to the application, in the presence of Mr. Rake, a policy form which, "to the best of his recollection," contained the statement, "\$3,000 other insurance concurrent herewith, permitted." Miss White, the defendant's policy writer, testified that, "as she remembered it, the original form that was attached to the application showed \$3,000 other insurance." She also said that she did not remember what the answer to item 27 was, but that they always made the policy agree with the written form on the application. Mr. Rake testified that no policy form or rider was attached to the application when he signed it, and that he did not see or know of any at that time. The policy form which it is claimed was attached to the application was destroyed in the defendant's office in Des Moines, and a purported copy thereof was attached to the policy. The application was altered by the defendant after it had been signed by the plaintiff and without the plaintiff's knowledge or consent. Nor was the plaintiff's attention at any time called to the fact that the defendant had assumed to change his application. On the contrary, the policy was delivered to the plaintiff with the statement that it was written in compliance with the application. If it be conceded that the defendant had the right to accept or reject the applica-

tion and to submit a policy different from the one called for, which would require an acceptance to make a contract, it still remains true that, when it delivered the policy to the plaintiff with the assurance that it was in accordance with the application, it is bound thereby. And such an assurance was a waiver of any agreement that the insured would notify the defendant if the policy was not right. The plaintiff clearly had the right to presume that the defendant would not change the application or issue a policy not in accordance therewith.

The judgment is *affirmed*.

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STATE OF IOWA, Appellant, v. J. B. ECKENRODE, Appellee.

**Interstate commerce:** WHAT LAW GOVERNS. The determination of  
1 whether a transaction constitutes interstate commerce so as to take it out of the control of a state law involves a construction of the federal Constitution and statutes, and state courts are bound thereby, and by the construction placed thereon by the United States Court.

**Same:** ORIGINAL PACKAGES: MISBRANDED ARTICLES: PURE FOOD STAT-  
2 UTE: ENFORCEMENT. Congress has provided regulations relating to the sale of original packages of misbranded articles imported from one state to another: So that where, as in this case, a company ships from another state to an agent in this state only such goods as are ordered by purchasers, placing several packages in a box, and the agent receives and opens the box, delivers the packages to customers according to their previous orders, the same being delivered in the form the company received them from the manufacturer, the transaction as a whole constitutes interstate commerce and is not subject to the pure food law of this state relating to misbranded packages; and the agent in delivering the packages to customers is not liable for a violation of the pure food law of this state.

*Appeal from Johnson District Court.*—HON. R. P.  
HOWELL, Judge.



FRIDAY, JULY 8, 1910.

DEFENDANT was accused of a violation of what is known as the state pure food law. Upon trial in the district court he was acquitted, and the state appeals.—*Affirmed.*

*H. W. Byers*, Attorney-General, and *Chas. W. Lyon*, Assistant Attorney-General, for the State.

*Wade, Dutcher & Davis*, and *Philemon S. Karshner*, for appellee.

DEEMER, C. J.—The case was tried on an agreed statement of facts and the only questions argued by counsel are whether or not, on the agreed facts, defendant was engaged in interstate commerce. The Attorney-General concedes that if he was so engaged the judgment is correct, and should be sustained. In view of this concession we are relieved of the necessity of determining whether or not the state, in the exercise of its police power, may not prohibit the sale of misbranded goods, although they may be the subject of interstate commerce and be sold in unbroken packages. The concession is bottomed in part upon the fact that Congress has acted upon the same subject and attempted to control this matter in so far as it relates to interstate shipments. See chapter 3915, Act June 30, 1906 (59th Cong.) 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187).

The latter act, so far as material, reads as follows:

Sec. 2. . . . Any person . . . who shall receive in any state or territory or District of Columbia, from any state or territory or the District of Columbia or foreign country and having so received shall deliver in original unbroken packages for pay or otherwise, or offer to deliver to any person any such article so adulterated or

misbranded within the meaning of this act . . . shall be guilty of a misdemeanor. . . .

Sec. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs . . . which shall be offered for sale in unbroken packages in any state other than that in which they shall have been respectively manufactured or produced. . . .

Sec. 10. That any article of food, drug or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one state, territory, district or insular possession to another, for sale, or having been transported, remains unloaded, unsold, or in original unbroken packages . . . shall be liable to be proceeded against. . . .

Counsel for the state contend that the trial court was in error in holding that the goods which defendant sold were in original packages, and, further, that under the agreed facts the articles which defendant had, became a part of the general mass of property within the state and were subject to its policy regulations.

From the agreed facts we extract the following as bearing upon the issues of law presented:

On or about the 17th day of December, 1908, defendant had in his possession in Iowa City, Johnson county, Iowa, for the purpose of delivering in said county a certain food product known as wheat flakes, the package or carton of which bore the printed statement marked 16 ounces, when in fact said package contained a less net weight than 16 ounces, the net weight of one of said packages being 12½ ounces; said defendant, J. B. Eckenrode, was then and there in the employment of the Citizens' Wholesale Supply Company, a corporation organized under the laws of Ohio, with its principal place of business at Columbus, in said state, under the terms of a printed contract, a copy of which is hereto attached marked, Exhibit A. In pursuance of said employment the said de-

feudant theretofore solicited orders from various residents of Iowa City; said orders being in writing, the following being a copy of the form used:

The Citizens' Wholesale Supply Company, Columbus, Ohio—Gentlemen: Please ship from your W. Ho. at Columbus, O., and deliver to me at the point indicated on the back of this order the following bill of goods ordered from your salesman:

Packed only in AMT. QUANTITY Bulk goods packed  
AMT. QUANTITY L Regular sizes

R 5, 10, 15, 20, 25 lb.  
sizes.

Natural Leaf Tea,	Roasted Gold R Blend Coffee,
Baking Powder,	Roasted,
Pepper, Cayenne, Ground,	Coffee Maker,
Allspice, Ground,	Coffee Mill,
Cloves,	Axle Grease—Golden Rule,
* * * *	* * * * *
G. R. Medicines, (L)	*Fruit Jar, Wrench & Holder,
Old Colony,	Fruit Jar, Lid Straightener,
Root Beer,	C. G. R. Toothpicks,
G. R. Soda,	Crackers.
Ink,	Total Amount,

\*Sell both if possible.

Goods shipped to be as good as sample shown by salesman.

Name.....  
Post Office.....

In taking said orders each customer gave a separate order and each order contained a description of the particular goods ordered by said customer; said customers did not sign said orders, but the defendant himself signed the name of said customers to the same; each order bore a serial number for the purpose of identification and the purchase price of each item in each order was set opposite the item ordered; each order upon the reverse thereof contained its serial number, the date when taken, the amount of the order and name and address of the purchaser,

and the name of the salesman. Said orders were by said defendant forwarded by mail to the Citizens' Wholesale Supply Company, at Columbus, Ohio, daily as taken, and there accepted by the Citizens' Wholesale Supply Company. A duplicate of each order was left with the purchaser at the time the order was solicited, and at convenient times the Citizens' Wholesale Supply Company aggregated the orders received from the defendant, and selected in said city of Columbus, Ohio, the goods described in said order in sufficient quantities to fill all the orders received at that time. Said goods were then packed for shipment in boxes of convenient size, each box containing a number of packages ordered by said customers, and, in this particular case, each box containing a number of the packages of wheat flakes and other articles ordered by said customers. The contents of said boxes were composed exclusively of goods previously ordered in the manner hereinbefore described; but no particular package of wheat flakes was designated by any mark thereon as the property of any particular customer. Said boxes thus prepared for shipment were consigned to the defendant at Iowa City, Iowa, and delivered to a transportation company at said city of Columbus in said state of Ohio. Upon their arrival at Iowa City, Iowa, the defendant opened said boxes in a wareroom rented by said Eckenrode in pursuance of his said employment, in Iowa City, Iowa, and the contents of said boxes were taken therefrom as convenience in delivering required, and among the contents of which boxes were the packages of wheat flakes hereinbefore referred to and in controversy in this action. Said packages were then taken by said defendant and delivered to the persons in Iowa City, Iowa, who had given orders for the same. This delivery was made by taking sufficient numbers of packages to fill various orders taken from convenient localities and placed in a conveyance, and said conveyance was driven to the homes of the persons giving said orders and there the goods called for by said order were delivered to said customers respectively.

In the opening of said large boxes in said wareroom in Iowa City, the contents were taken out of the boxes and and were set about the room, as suited the convenience of defendant in making said delivery.

Upon the delivery of the goods ordered to the respec-

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tive customers giving said orders, payment was made to said Eckenrode in cash therefor, in accordance with the terms of the order.

The Citizens' Wholesale Supply Company did not manufacture or pack the wheat flakes in question, but the same were manufactured and packed by the Lake Odessa Cereal Company, of Lake Odessa, Mich., and delivered by Eckenrode in the identical packages in which they were packed by said company. The said wheat flakes were purchased by the Citizens' Wholesale Supply Company from the said Lake Odessa Cereal Company under the written guaranty of said Lake Odessa Cereal Company that the wheat flakes and the packages containing them complied with the act of Congress of June 30, 1906, regulating interstate traffic in foods and drugs.

All goods, delivery of which was not accepted by the customers, were returned by the defendant to the Citizens' Wholesale Supply Company, at Columbus, Ohio.

The money collected by the defendant upon the delivery of said goods, less the expense of the delivery of the goods, and his commission for soliciting said orders in making said delivery in accordance with his contract of employment, was sent to the Citizens' Wholesale Supply Company at Columbus, Ohio and said defendant was under bond to the Citizens' Wholesale Supply Company to account for the moneys collected.

No delivery of goods was made by the defendant in Iowa City, Iowa, except as above stated and he had no goods in his possession for delivery, except under the circumstances above set out.

On or about the 17th day of December, 1908, while the defendant was in the act of making the delivery as above set forth, the packages of wheat flakes in question were delivered to M. E. Flynn, state food inspector, upon his request, and at the time said packages were delivered there were numerous packages of groceries and articles of food in packages strewn about the room from which said goods were delivered and where said goods were stored, but that all of said packages of groceries and other food products were shipped to and received by the defendant under the circumstances hereinbefore detailed and the same at the time of the making of the delivery were not in the

original unbroken shipping package in which they were shipped from Columbus, Ohio, to the defendant in Iowa City, Iowa.

We here copy such parts of Exhibit A, being the contract between the Supply Company and the defendant, as are deemed material:

#### Regular Salesman's Contract.

This agreement entered into by and between the Citizens' Wholesale Supply Company, of Columbus, Ohio, as party of the first part, and J. B. Eckenrode, of Gettysburg, state of Pennsylvania, as party of the second part, witnesseth:

The said first party hereby agrees to employ the said second party as a traveling salesman to sell the goods and merchandise of the said first party for a period of one year from date of this agreement, and agrees to pay said party for his services as follows: Commissions on different classes of goods ranging from 5 percent to 50 percent, as per the regular terms of said first party, applying to classes L and R.

The said second party agrees to pay his board, all traveling expenses, and other expenses necessary to transact the business of the said first party, out of said commissions, and authorize any collector or acting collector in the service of the said first party to apply to the payment of said expenses, any part of said commissions before any part of said commissions shall be paid to the said second party.

The said first party agrees to make weekly cash advances to the second party, in accordance with the terms of General Circular No. 214, subject, 'Advance on Orders,' issued by the said first party.

The said first party agrees to furnish a sample case and all necessary samples of said merchandise to be sold by the said second party, and all stationery for his use in said business, free of charge, and the said second party on his part agrees to devote his entire time and attention to the exclusion of all other business, to furthering the interests and maintaining and increasing the trade of the

said first party, by all means in his power, and to stand ready at any and at all times to represent the said first party in any section or territory the said first party may see fit to send him; and further agrees to obey such orders and instructions as may from time to time be issued to him by said first party, either direct or through duly accredited foreman, general or special agents.

The said second party agrees in case of loss of said sample case, samples and stationery, to pay to the said first party the value thereof in a sum not to exceed twelve dollars (\$12.00).

The said second party further agrees to deposit with the said first party the sum of one dollar as security, for the regular price book of said first party, which sum will be returned on surrendering said price book and samples in reasonably good condition.

The said first party herein reserves the right to terminate this contract at any time on the failure of the said second party to comply with the conditions and requirements of this contract, or for any other cause deemed sufficient by said first party.

There is considerable confusion in the cases regarding what constitutes an original package, due largely to the manner in which the question arose and somewhat to the nature of the power which the state was attempting to exercise. In previous cases we have, for the purpose of arriving at a correct decision of the particular question at issue, defined an original package. See *McGregor v. Cone*, 104 Iowa, 465, and cases cited. In that case it is said:

The question then arises, what is an 'original package'? The definition commonly accepted and believed by us to be correct, is that 'it is a bundle put up for transportation or commercial handling, and usually consists of a number of things bound together, convenient for handling and conveyance.' See *State v. Board of Assessors*, 46 La. Ann. 146 (15 South. 10, 49 Am. St. Rep. 318); *Keith v. State*, 91 Ala. 2 (8 South. 353, 10 L. R. A. 430); *U. S. v. One Hundred and Thirty-Two Packages*, 22 C. C. A. 228 (76 Fed. 364). In the case of *State v. Winters*, 44 Kan. 723 (25 Pac.

237, 10 L. R. A. 616), it is said: 'The original package was and is the package as it existed at the time of its transportation from one state to another.' It is quite apparent, we think that the words 'original package' have reference to the unit which the carrier receives, transports and delivers, as an article of commerce. The importer decides for himself the size of the package which he desires to import, and when he delivers it to the carrier for transportation he gives it the initial step, and from that time until sold in that form or broken, and transformed, it is the subject of interstate commerce. But when sold or broken, or when it changes form, it ceases to be an article of interstate commerce, and no longer enjoys this protection. The original package, then, is that package which is delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. If sold, it must be in the form as shipped or received: for, if the package be broken after such delivery, it, by that act alone, becomes a part of the common mass of property within the state, and is subject to the laws of that state enacted in virtue of its police power.

In that case, however, the appellant was a resident of the state engaged in the business of selling cigarettes at retail. He purchased and imported the goods himself and resold them as his own. That these circumstances were regarded as important, if not controlling is manifest from this further excerpt from the opinion:

Here the appellant is a resident of the state, engaged in the business of selling cigarettes at retail, and as such is amenable to all its laws which do not deprive him of some constitutional right. When he received the package which had been made up by the manufacturer, and started upon its journey, he opened it and displayed its contents, not the package, for sale; and it affirmatively appears that he sold one of the small parcels from the original package to a customer who applied for the same. We think these distinguishing features are quite important; for if it be the rule that all imported goods, no matter how treated or sold, are exempt from state taxation or regulation, it is apparent that the state must forego the exercise of the



power of taxation and regulation, in cases where the right has never heretofore been questioned. See *State v. Wheelock*, 95 Iowa, 577.

As the question now before us involves a construction of the federal Constitution and Statutes we must follow the decisions of the Supreme Court of the United States and not those of the state courts, nor the cases heretofore announced by us, if they be in conflict with the rules announced by the final arbiter of such matters.

In approaching the question it must be remembered that defendant was acting purely as an agent for a non-resident seller and not as a merchant or vendor. He merely took orders, made delivery of the goods, and accepted and received the purchase price for and on behalf of his principal, the Supply Company, and the proposition involved is his liability under the pure food laws of the state. It is agreed that if he were the seller and his acts could be divorced from interstate commerce he would be guilty, because the packages which he sold were misbranded in that they did not contain the number of ounces stated on the outside of the cartons. So that we must determine whether or not, under the agreed facts, defendant's acts were of such a character as that our statute can not, under the decisions and rulings of the United States Supreme Court, be made applicable thereto. Several cases have gone to that court which involved similar facts to those presented in this case. In quoting from the opinions in these cases the distinction between sales made by the purchaser of goods imported by him and sales made by one as agent of a nonresident importer must be borne in mind. Giving due heed to this distinction apparent conflict in the rules announced disappears and the controlling principle is easily discovered.

1. INTERSTATE  
COMMERCE:  
what law  
governs.

2. SAME: orig-  
inal packages:  
misbranded  
articles:  
pure food  
statute:  
enforcement.

In *Brown v. Maryland*, 25 U. S. 419 (6 L. Ed. 678) the court said:

It is sufficient for the present to say, generally that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state.

In *Low v. Austin*, 80 U. S. 29 (20 L. Ed. 517) we find the following:

Goods imported do not lose their character as imports and become incorporated into the mass of property of a state, until they have passed from the control of the importer, or been broken up by him from their original cases.

From the syllabus of *Leisy v. Hardin*, 135 U. S. 100 (10 Sup. Ct. 681, 34 L. Ed. 128) we quote as follows:

A statute of a state, prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, and under a license from a county court of the state, is, as applied to a sale by the importer, and in the original package or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several states.

From the opinion in that case, written by the Chief Justice, we make the following extract:

While by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state, unless placed there by Congressional

action. *Henderson v. Mayor*, 92 U. S. 259 (23 L. Ed. 543); *Railroad Co. v. Husen*, 95 U. S. 465 (24 L. Ed. 527); *Walling v. Michigan*, 116 U. S. 446 (6 Sup. Ct. 454, 29 L. Ed. 691); *Robbins v. Taxing District*, 120 U. S. 489 (7 Sup. Ct. 592, 30 L. Ed. 694).

Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled. *County of Mobile v. Kimball*, 102 U. S. 691 (26 L. Ed. 238); *Brown v. Houston*, 114 U. S. 622, 631 (5 Sup. Ct. 1091, 29 L. Ed. 257); *Railroad Co. v. Illinois*, 118 U. S. 557 (7 Sup. Ct. 4, 30 L. Ed. 244).

From the syllabus to *Vance v. Vandercock*, 170 U. S. 438 (18 Sup. Ct. 674, 42 L. Ed. 1100) we quote the following:

The right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress; and hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States. The power to ship merchandise from one state into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the state.

In *May v. New Orleans*, 178 U. S. 496 (20 Sup. Ct. 976, 44 L. Ed. 1165) it appeared that May & Co., merchants at New Orleans, were engaged in the business of importing goods from abroad, and selling them. In each

box or case in which they were brought into this country, there would be many packages, each of which was separately marked and wrapped. The importer sold each package separately. The city of New Orleans taxed the goods after they reached the hands of the importer (the duties having been paid) and were ready for sale. Held, that the box, case or bale in which the separate parcels or bundles were placed by the foreign seller, manufacturer or packer was to be regarded as the original package, and when it reached its destination for trade or sale and was opened for the purpose of using or exposing to sale the separate parcels or bundles, the goods lost their distinctive character as imports, and each parcel or bundle became a part of the general mass of property in the state, and subject to local taxation.

Generally speaking, these are the cases relied upon by counsel for the state, and it is apparent that none of them reach the exact proposition presented by the record in the instant case. There are decisions from that court which, to our minds, clearly rule the one now before us. They commence probably with the *State Freight Tax Cases*, 15 Wall. 232, 21 L. Ed. 146) and conclude perhaps with *Rearick v. Penn.*, 203 U. S. 507 (27 Sup. Ct. 159, 51 L. Ed. 295). From some of these we shall quote to demonstrate how closely they are in point. For example, in *Bowman v. Railroad Co.*, 125 U. S. 465 (8 Sup. Ct. 689, 1062, 31 L. Ed. 700) the court said:

Beyond all question, the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. . . . It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the states . . . nor does it make any difference whether this interchange of commodities is by land or by water. In either case the

bringing of the goods from the seller to the buyer is commerce.

In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (5 Sup. Ct. 826, 29 L. Ed. 158) the court said:

The means of transportation of persons and freight between the states does not change the character of the business as one of commerce, nor the time within which the distance between the states may be traversed. The power of Congress to regulate commerce also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged.

There are two cases from that court so nearly in point and so conclusive that without noting others we shall make liberal quotations from these two, because we find therein the rules which govern the case now before us. These decisions are *Caldwell v. North Carolina*, 187 U. S. 622 (23 Sup. Ct. 229, 47 L. Ed. 336) and *Rearick v. Pennsylvania*, 203 U. S. 507 (27 Sup. Ct. 159, 51 L. Ed. 295). In the former Judge Shiras, writing the opinion, said:

The defendant, Caldwell, being employed by the Chicago Portrait Company, of Chicago, Ill., went to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employees of the Chicago Portrait Company, who had preceded the defendant in Greensboro. The defendant went to the Southern Railway freight station and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., addressed to the Chicago Portrait Company, carried these packages to his rooms in the Woods House, a hotel in the city of Greensboro, and there broke the bulk, placing said pictures in their proper frames, and from this point delivered the pictures, one at a time, to the purchasers in the city of Greensboro. The defendant had been engaged in this work two days when arrested.

The state Supreme Court endeavored to distinguish the present case from that of *Brennan v. Titusville*, 153 U. S. 189 (14 Sup. Ct. 829, 38 L. Ed. 719) in the following observations: 'The defendant insists that *Brennan v. Titusville* is directly in point, . . . is, in every essential fact, this case . . . and should control the opinion of the court on this appeal. And it is in many respects like this case, but there is one material difference between that case and this, which marks the distinction. In this case they were shipped by the Chicago Company to itself in the city of Greensboro; and when they reached Greensboro, the defendant as the agent of the Chicago Company, received them from the railroad at its depot, carried them to its room in Greensboro, opened the boxes in which they were shipped, took out the pictures and frames, assorted them and put them together, and delivered them to the purchasers in the city of Greensboro, and had been engaged in this work two days when arrested. If they had been completed and shipped directly to the parties for whom they were intended, this case would have fallen within the decision of *Brennan v. Titusville*, and we should so hold as it was held there that it was an interference with interstate commerce, and that the defendant was not guilty. But to our minds, there is a decided difference between this case and that. The contract to make and deliver these pictures was an executory contract, and no title passed by this contract. If they had been completed in Chicago, and under contract shipped to the purchaser, the title would have passed to the consignee upon delivery to the railroad in Chicago, the railroad being deemed to be the agent of the consignee, and *Brennan v. Titusville* would have applied, as the tax would then have been upon the commerce. But instead of completing the pictures in Chicago and shipping them to the parties who had contracted for them, they were shipped to itself, the Chicago Portrait Company, in Greensboro. This being so, no title ever passed from the Chicago Portrait Company, until the pictures were put in the frames and delivered by the defendant. These pictures belonged to the Chicago Company when they were shipped from Chicago, and belonged to it when they got to Greensboro, and the question is, could the Chicago Portrait Company, because it was a foreign

corporation, engage in the business of completing these pictures, and in selling and delivering them in Greensboro, without becoming liable to a city tax for which its own citizens would be liable? It seems to us that it could not.'

Mr. Justice Shiras, after quoting the foregoing from the opinion of the Supreme Court of North Carolina, said:

We are not persuaded by this reasoning. It seems to proceed from two propositions: First, that the pictures in question were not completed before they were brought to Greensboro; and, second, that the articles were not shipped directly to the purchasers, but to an agent of the senders in Greensboro. But it certainly can not be pretended that if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed either on the vendor out of the state or the purchaser within the state. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question, be interstate commerce beyond the reach of the taxing power of the state. It is too plain for argument that the supposed incomplete condition of articles of commerce, if shipped directly to the purchasers can not subject them to a license tax. But we are not disposed to concede that, under the facts of this case, the pictures were, in any proper sense, incomplete when received in Greensboro. That the frames and the pictures were in separate packages, if such was the case, was merely for convenience in packing and handling, and placing the pictures in their proper places (the language of the verdict) meant that each picture was placed in the frame designed for it. . . .

Nor does the fact that the articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected

the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent, who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate. Transactions between manufacturing companies in one state, through agents, with citizens, of another constitute a large part of interstate commerce; and for us to hold, with the court below, . . . that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but if sent to an agent to deliver are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution.

Even more closely in point is the *Rearick Case*, from which we quote as follows:

The following is a shortened statement of the facts agreed: An Ohio corporation employed an agent to solicit in Sunbury, retail orders to the company for groceries. When the company had received a large number of such orders it filled them at its place of business in Columbus, Ohio, by putting up the objects of the several orders in distinct packages and forwarding them to the defendant by rail, addressed to him for 'A. B.,' the customer, with the number of the order also on the package for further identification. The company ultimately kept the orders, but it kept no book accounts with the customers, looking only to the defendant. The defendant alone had authority to receive the goods from the railroad, and when he received them he delivered them, as was his duty, to the customers for cash paid to him. He then sent the money to the corporation. The customer had the right to refuse the goods if not equal to the sample shown to him when he gave the order. In that or other cases of nondelivery the defendant returned the goods to Columbus. No shipments were made to defendant except to fill such orders, and no deliveries were made by him except to the parties named on the packages. In the case of brooms, they were tagged



and marked like the other articles, according to the number ordered, but they then were tied together into bundles of about a dozen, wrapped up conveniently for shipment. The defendant had no license, but relied upon the invalidity of the ordinance, as we have said.

If the acts of the plaintiff in error were done in the course of commerce between several states, the law is established that his request for a ruling was right, and that he should have been discharged. *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 497 (7 Sup. Ct. 592, 30 L. Ed. 694); *Leisy v. Hardin*, 135 U. S. 100 (10 Sup. Ct. 681, 34 L. Ed. 128); *Caldwell v. North Carolina*, 187 U. S. 622 (23 Sup. Ct. 229, 47 L. Ed. 336). It will be seen from the insertion of the statement concerning the brooms that a ground relied upon by the prosecution to avoid that conclusion was that the goods, or at least this part of them, were not in the original packages when delivered, and that therefore the case did not fall within the decisions last cited, but rather within *Austin v. Tennessee*, 179 U. S. 343 (21 Sup. Ct. 132, 45 L. Ed. 224); *Cook v. Marshall County*, 196 U. S. 261 (25 Sup. Ct. 233, 49 L. Ed. 471); *May v. New Orleans*, 178 U. S. 496 (20 Sup. Ct. 976, 44 L. Ed. 1165). In other words, it was contended that the brooms, before they were sold, had become mingled with, were part of, the common mass of goods in the state, and so subject to the local law. But the doctrine as to original packages primarily concerns the right to sell within the prohibiting or taxing state goods coming into it from outside. When the goods have been sold before arrival, the limitations that still may be found to the power of the state will be due, generally, at least, to other reasons, and we shall consider whether the limitations may not exist, irrespective of that doctrine, in some cases where there is no executed sale. Hence the prosecution, whatever its assumption on the point last mentioned, sought to show that there was no sale, until the goods were delivered and the cash paid for them. The superior court contented itself with the suggestion that the contract would have been satisfied by the delivery of articles corresponding to the sample, although bought at the next door. The argument submitted to us goes farther, and affirms that the order was not accepted and did not bind the corporation until the delivery took place.

The answer to the latter of the two positions just stated is simple. The fair meaning of the agreed fact that the orders were given to agents employed to solicit them, is that the company offered the goods and that the orders were acceptances of offers from the other side. If there were the slightest reason to doubt that the contracts were made with the company through its authorized agent at the moment when the orders were given, which we do not perceive that there is, certainly the contrary could not be assumed in order to sustain a conviction. It is for the prosecution to make out its case. We may mention here in parenthesis that, of course, it does not matter to the question before us that the contract was made in Pennsylvania. *Brennan v. Titusville*, 153 U. S. 289 (14 Sup. Ct. 829, 38 L. Ed. 719).

Commerce among the several states is a practical conception not drawn from the 'witty diversities' (Yelve, 33) of the law of sales. *Swift & Co. v. United States*, 196 U. S. 375, 398 and 399 (25 Sup. Ct. 276, 49 L. Ed. 518). The brooms were specifically appropriated to specific contract, in a practical, if not in a technical sense. Under such circumstances it is plain that, wherever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce. In *Brennan v. Titusville*, 153 U. S. 289 (14 Sup. Ct. 829, 38 L. Ed. 719) pictures were sold by sample, as the brooms were here, and although the pictures were consigned to the purchasers directly, the railroad collecting the price, there was no discussion of the question whether the title had passed. In *American Express Company v. Iowa*, 196 U. S. 133, 143 (25 Sup. Ct. 182, 49 L. Ed. 417) that question was referred to only to be waived. In *Caldwell v. North Carolina*, 187 U. S. 622 (23 Sup. Ct. 229, 47 L. Ed. 336) the pictures were consigned to the defendant, an agent, as here, with the additional facts that the pictures and frames were sent in large packages which were opened by the agent on their arrival, and that the pictures, then, for the first time, were put into their proper frames, and for all that appears, then for the first time, appropriated to specific purchasers.

These two excerpts are so conclusive upon the proposi-

tion now before us that there is little left for further discussion. For the purposes of this case it will be observed that they delimit the original package theory as applied to the facts in the record now before us. These cases have been followed by other courts and in other jurisdictions as will be seen from the following citations: *In re Spain* (C. C.) 47 Fed. 208 (14 L. R. A. 97); *In re Tyerman* (C. C.) 48 Fed. 167; *City of Huntington v. Mahan*, 142 Ind. 695 (42 N. E. 463, 51 Am. St. Rep. 200); *Tax Collector v. Pettigrew*, 44 La. Ann. 356 (10 South. 853); *State v. Willingham*, 9 Wyo. 290 (62 Pac. 797, 52 L. R. A. 198, 87 Am. St. Rep. 948); *Stone v. State*, 117 Ga. 292 (43 S. E. 740); *Menke v. State*, 70 Neb. 669 (97 N. W. 1020); *Wilcox v. People*, 46 Colo. 382 (104 Pac. 408). Following the decisions of the Supreme Court of the United States it is apparent that defendant can not be convicted of a violation of our pure food statutes under the agreed facts.

We shall not, for reasons already stated, discuss the limitations upon the police power of the state. Doubtless the attitude of the Attorney-General with reference to this matter is due in part to the decisions of the Federal Supreme Court in *Leisy v. Hardin*, supra. *New Orleans Co. v. Light Co.*, 115 U. S. 650 (6 Sup. Ct. 252, 29 L. Ed. 516); *Henderson v. Mayor*, 92 U. S. 259 (23 L. Ed. 543); *Railroad Co. v. Husen*, 95 U. S. 465 (24 L. Ed. 527); *Walling v. Mich.*, 116 U. S. 446 (6 Sup. Ct. 454, 29 L. Ed. 691) and other like cases. There is no subject more perplexing than that of the limitations upon the police power of the state and we shall not attempt a discussion thereof without full argument by counsel. There is no occasion to decide the matter now, for it is not argued and this opinion should not be regarded as settling the matter for this jurisdiction. Whatever our individual views of the question upon principle, or however we may regard some of the decisions of the United States Supreme Court

upon this proposition, is now immaterial; for the matter is not presented on this appeal.

The decision of the trial court seems to be correct, and it is *affirmed*.

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W. H. BECK, Appellant, v. E. B. WOODRUFF, Judge.

**Intoxicating liquors: PAYMENT OF MULCT TAX: EFFECT.** Compliance  
1 with the mulct law will not authorize the sale of intoxicating  
liquors outside of a city or town.

**Same: CONSTITUTIONAL LAW: SPECIAL PRIVILEGES.** The law prohibit-  
2 ing the sale of intoxicating liquors outside of cities and towns  
is not unconstitutional, as giving the inhabitants of cities and  
towns special privileges.

*Appeal from Pottawattamie District Court.*—HON. E. B.  
WOODRUFF. Judge.

FRIDAY, JULY 8, 1910.

CERTIORARI proceedings. The opinion states the case.  
—*Affirmed*.

*Flickinger Bros.*, for appellant.

No appearance for appellee.

SHERWIN, J.—The plaintiff sold intoxicating liquors at Manawa Park, a place of public resort outside of the limits of any city or incorporated town, but within an organized township.

He had complied with the provisions of the mulct law, and the question before us is whether the business can be lawfully conducted at any place within a county

when a statement of general consent has been filed as provided by law and found to be sufficient.

The payment of the mullet tax in accordance with the provisions of law operates as a bar only when the conditions of section 2448 have been complied with, and when the business is carried on in a place authorized by the statute.

Section 2449 provides for the operation of the bar in cities and towns of less than 5,000 inhabitants, and it does not authorize the business outside of cities and towns. The section itself clearly distinguishes between towns and townships, because it requires the consent of a majority of the voters in the township, including the town, to authorize sales in the town. The statute does not, by implication even, permit the business outside of cities and towns, and it is well settled that the bar is effective only when the business is carried on at a place and in the manner designated by the statute.

Section 2445 of the Code provides for the apportionment of the mullet tax, and says that if the business is conducted outside the limits of a city or town, one-half of the tax shall be paid to the clerk of the township, and because of this provision, the appellant contends that he was authorized to sell in the township outside of the limits of a city or town. Anyone found in the business is subject to the tax, and this is true whether he be legally engaged therein or not. Section 2445 does no more than to provide for the apportionment of the tax when collected, and does not purport to authorize the business in any manner nor in any place. Indeed, section 2447 expressly provides that the payment of any tax for the sale of liquors shall not protect the wrongdoer, except as provided in the section creating the bar, and the section creating the bar designates the places where the business may be conducted.

The appellant further contends that if the business can not be lawfully conducted outside of cities and towns,

the law is unconstitutional because it gives to the inhabitants of cities and towns privileges which are denied to those living outside thereof. The appellant can hardly be serious in this contention. No discrimination is made against any one in the matter of engaging in the business, and the consumer is not in our judgment denied any constitutional right.

The judgment of the trial court is *affirmed*.

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W. P. TRUMBO ET AL., Appellants, v. R. P. PRATT.

**Drainage:** SURFACE WATER. Lower lands are charged with the burden of taking care of the natural flow of surface water from the lands above; but a dominant proprietor can not materially increase this burden by ditching and draining other lands into a swale through which the surface water naturally flowed.

**Same:** OBSTRUCTION OF SURFACE WATER: ESTOPPEL. A dominant owner can not complain of the maintenance of a fence or water gate by the lower owner over a natural watercourse where the same enters his land, because it may impede the flow of rubbish and debris gathered by the water on the upper owner's land; and where such water gate or fence has been maintained by the lower owner for a long series of years in substantially the same manner the upper owner is on that ground estopped to complain of the same.

*Appeal from Van Buren District Court.*—HON. F. W. EICHELBERGER, Judge.

FRIDAY, JULY 8, 1910.

ACTION in equity to abate a nuisance. Judgment for the defendant. Plaintiffs appeal.—*Affirmed*.

*Walker & McBeth*, for appellants.

*Robert & H. B. Sloan*, and *Work & Brown*, for appellee.

SHERWIN, J.—The plaintiffs are the owners of lands on the west of a north and south public highway, and the defendant is the owner of land that abuts the same highway on the east. In its natural state there was a swale extending across the defendant's land into the land of the plaintiffs west of him. This swale was a natural course for the surface water of both tracts of land, and of some other land adjacent thereto. In 1884, the defendant constructed a ditch from the highway west of him southeast down through this swale across his land. This ditch has remained open ever since and has been gradually enlarged by the action of the water. The natural course of the drainage is from the northwest to the southeast, and after the defendant had constructed the ditch through his land the plaintiff Trumbo, or his father, ditched from the highway west through his land, and thus made a continuous water course across both farms and the highway. The defendant's farm has been fenced ever since he constructed his ditch, and he has always maintained a water gate where the ditch enters his land on the west.

The plaintiff brought this action to enjoin him from further maintaining such water gate, and to abate it as a nuisance. In its natural state the defendant's land was burdened with the natural flow of surface water from the land above. But the dominant proprietor had no right to increase the burden thus created by nature and the law. When the defendant constructed his ditch it is obvious that he facilitated the flow of water from his own land and from the land above him, and that the ditch itself is no obstruction to the plaintiff's rights. Had the swale remained in its original state, the defendant would have had the right to fence his land in such a way as not to unreasonably interfere with the surface drainage of the land above him, and it is manifest that he has the same right now. So far as the merits of this case are concerned then,

the question is whether the defendant's fence or water gate across the ditch is an unreasonable obstruction thereof.

A careful reading of the record convinces us that it is not. It is not seriously claimed that the gate is an obstruction in itself, but the contention is that it impedes the passage of the debris that is gathered from the lands of the plaintiffs and from the highways that contribute water to the ditch, and the evidence tends to show that the only rubbish which has lodged against the water gate has come from the lands of the plaintiff, Trumbo. It is apparent that Trumbo can not complain of any obstruction that he creates or permits by allowing corn stalks and straw to be taken from his land into the ditch. We are aware of no rule of law which requires the defendant to take care of water flowing from above and at the same time to take care of the rubbish which the dominant owner may see fit to send into the water, or permit to enter it. But aside from the above consideration, the evidence fails to show any serious obstruction to the free passage of water through the ditch. The weight of the evidence also shows that the water gate is in substantially the same condition, that it has been in for the past twenty-five years, and, for that reason alone, the plaintiffs are estopped from now complaining thereof. *Brown v. Armstrong*, 127 Iowa, 178; *Matteson v. Tucker*, 131 Iowa, 511.

The judgment of the trial court is right and it is affirmed.

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C. D. BOYNTON, Plaintiff, v. Z. A. CHURCH, Judge,  
Defendant.

**Appeal:** STAY OF PROCEEDINGS. An appeal does not stay proceedings on the judgment appealed from except a *supersedeas* bond is given; and a provision in a decree of foreclosure suspending process and sale pending an appeal is not effective.

**Same:** REVIEW OF ERRONEOUS ORDER. The court has jurisdiction in



- 2 the matter of a stay of execution and though its order may be erroneous there is an adequate remedy by appeal, and hence the error is not reviewable by *certiorari*.

**Same:** DISCRETION. Although the matter of staying proceedings pending appeal might be discretionary, in the absence of statutory regulation, still this is not true where the precise method for staying process is prescribed by the statute.

PROCEEDINGS in *certiorari*. Petition *dismissed*.

FRIDAY, JULY 8, 1910.

W. C. Saul, for plaintiff.

L. H. Salinger, for defendant.

LADD, J.—Upon entering the decree in the district court in *Boynton v. Salinger*, 147 Iowa, 537, the defendant as presiding judge caused to be inserted the following clause: "Process upon this decree is to be suspended, and no sale is to take place pending appeal, provided that appeal be perfected within thirty days after the entry of this decree." Thereafter a motion to expunge the clause from the decree was overruled. It is contended in this proceeding that in inserting said clause the trial court exceeded its jurisdiction. The effect of the order was upon appeal to supersede the judgment without bond. That the ruling was erroneous must be conceded. *Carroll v. Reddington*, 7 Iowa, 386; section 4128, Code. An appeal does not operate to stay proceedings on the judgment appealed from save upon the execution of a supersedeas bond. Section 4128, Code. "If a party has perfected his appeal and the clerk of the lower court refuses to approve the bond or requires an excessive penalty, or unjust or improper conditions, he may apply to the district court or judge thereof who shall fix the amount and conditions of the bond and approve the same. Pending the application, the judge may,

by written order, recall and stay all proceedings under the order or judgment appealed from until the decision of the application." Section 4132, Code. The following section authorizes the district court rendering the judgment or order appealed from on motion to discharge the bond for defect in substance or insufficiency in security. Section 4134 provides that: "If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the condition shall be to save the appellee harmless from the consequences of taking the appeal, but in no case shall the penalty be less than one hundred dollars."

These sections clearly authorize the district court to supervise the execution of supersedeas bonds, and, power to do so having been conferred, the exercise thereof is not without jurisdiction, even though the order or ruling in a particular case may have been erroneous. In staying process on the decree in violation of the statute, the district court erred; but, as the order was within its jurisdiction, and there was a plain, speedy and adequate remedy by appeal, the error was not reviewable by certiorari. *Denmead v. Parker*, 145 Iowa, 581. In the absence of statutory regulations, it may be that the matter of staying proceedings pending appeal is discretionary. *Ex parte Epley*, 10 Okl. 631 (64 Pac. 18); 2 Cyc. 891. But not so where precisely what is requisite to stay process is prescribed by statute. *Winter v. Coulthard*, 94 Iowa, 312, merely recites the effect of an order without approving it; the syllabus being misleading in this respect.

The petition is *dismissed*.

CHARLES E. WELSH v. TRI-CITY RAILWAY COMPANY,  
Appellant.

**Street railways: OPERATION OF CARS: DUTY OF MOTORMAN.** The duty

- 1 of a motorman on a street car, to keep a lookout for persons within or approaching the zone of danger, is greater than that of an engineer in charge of a steam railway engine, operated upon a track where there is no reason to anticipate the presence of people.

**Same: NEGLIGENCE: LAST CLEAR CHANCE: SUBMISSION OF ISSUE.**

- 2 Where the evidence, as in this case, showed that the motorman saw plaintiff working near the track, in a position of danger and without apparently noticing the approach of the car, in time to have stopped the car by the exercise of reasonable care and thus have avoided the accident, the defendant was liable for the injury although plaintiff may have been negligent in placing himself in a position of danger, and the case was properly submitted on that theory.

**Same: LAST CLEAR CHANCE.** The doctrine of the last clear chance

- 3 does not involve a recognition of liability in case of concurrent negligence, nor does it involve any case of comparative negligence, but requires one to use reasonable care for the safety of another in the condition in which the latter, though negligently, may have placed himself.

**Excessive damages: REDUCTION OF VERDICT.** Where the court may

- 4 have found from the evidence that the verdict was excessive, not because of passion or prejudice, but because the jury mis-conceived the proper measure of damages, the court's action in permitting a reduced verdict to stand rather than setting it aside *in toto* was not error.

*Appeal from Scott District Court.*—HON. JAS. W.  
BOLLINGER, Judge.

FRIDAY, JULY 8, 1910.

ACTION to recover damages for personal injuries al-

leged to have resulted from negligence of employees of the defendant company in operating a street car so that the same ran against and upon the plaintiff. There was a trial to a jury, and a verdict for the plaintiff for the sum of \$17,000. On a motion for a new trial, the court required the remission of the excess in the verdict over \$10,000. Plaintiff elected to accept a judgment for that amount, and from such judgment the defendant appeals.—*Affirmed.*

*Lane & Waterman, and Cook & Balluff, for appellant.*

*Ely & Bush, and Wade, Dutcher & Davis, for appellee.*

McCLAIN, J.—The plaintiff, at the time of receiving the injury complained of, was in the employ of the People's Light Company, which was laying a main along the north side of East River Street in the city of Davenport, a street running practically east and west on which were two lines of track of the defendant street car company. His business at the time was to work at pumping water from the ditch by means of a pump and hose, and discharge it through a simple wooden trough across the north railway track. His hours of work were during the nighttime and extended until the time for the regular force of men to go to work in the morning. The street cars of the defendant ran along the tracks in this street about twenty minutes apart each way until midnight, and then about one hour apart each way until about five o'clock in the morning, when cars were started out again on the shorter schedule. While cars were being run on their regular schedule, they were run west on the north track and east on the south track, but it seems that for some reason connected with the convenient distribution of the cars the first car started out in the morning on the shorter schedule would run west on the south track instead of on the north track, and it was

this first car running west on the south track which collided with plaintiff and caused the injury complained of.

From the evidence the jury may have properly found that plaintiff had been directed by his employer, when he saw a car approaching on the north track, which would usually be from the east, to pick up the end of his trough and lay it between the two tracks leaving the north track free for the passage of the approaching car, and that in doing so he should face to the west so as to see any car approaching from that direction on the south track which would put him in peril. In other words, his duty seems to have been to get his trough off of the north track when a car was approaching on that track and to pass far enough to the south to be out of the way of the approaching car which would usually be from the east, and at the same time keep a lookout for a car from the west; for there was not sufficient room between the two tracks to enable the plaintiff to stand in such a position as to be at once out of danger from cars either way. The jury might also have found under the evidence that on this particular occasion the plaintiff saw the car which subsequently collided with him approaching from the east around a slight curve, and, supposing it to be on the north track as usual picked up the north end of his trough and carried it eastward and south in order to clear the north track and placed himself on the south track, or so near thereto, as to be in danger of collision with the car from the east which was in fact on the south track. Had plaintiff observed that the car was in fact on the south track, there would have been no occasion for him to move his trough and he might have continued his occupation of pumping without interruption. The plaintiff did not, according to his testimony, look again to the east after he started to carry the north end of his trough around toward the south track and was struck by the car and severely injured.

The court instructed the jury that plaintiff was negli-

gent in failing to see that the approaching car was running on the south track, and in placing himself in a position to be injured by such car, and submitted to the jury but one question—that is, whether the motorman on the approaching car failed to exercise reasonable care to discover plaintiff's peril and to avoid injury as soon as it was reasonably apparent that plaintiff was in danger or was going into a place of danger—and authorized a recovery by the plaintiff if it should be found that in the exercise of reasonable care after the motorman saw or might have discovered in the exercise of reasonable care that plaintiff was thus in a position of danger, he could have avoided the injury by stopping his car. In other words, the sole question submitted to the jury was one involving the application of the doctrine of the last clear chance.

It is not necessary in this case to discuss the question whether the motorman in charge of a street car is bound to look out for persons on the street in such sense that the company is liable for failure to avoid injury to a person who has placed himself negligently in a position of danger, for the jury might have found under the evidence that

1. STREET RAIL-  
WAYS: opera-  
tion of cars:  
duty of  
motorman.

the motorman did in fact see the plaintiff in a position of danger, or at least approaching a position of danger in time to have avoided injury to him. It is well settled however that the duty of the motorman on a street car to be on the lookout for persons within or approaching the zone of danger is different from that of an engineer in charge of a railway engine operated along a right of way where there is no reason to anticipate the approach of persons to the track. *Doherty v. Des Moines City Ry. Co.*, 137 Iowa, 358; *Barry, Adm'r, v. Burlington Ry. & L. Co.*, 119 Iowa, 62; *Doran v. Cedar Rapids & Marion City Ry. Co.*, 117 Iowa, 442. The court did not in this case require that the jury should find wilfulness or wantonness on the

part of the motorman, and we have no occasion to consider what the rule might be if there were such evidence.

The case was therefore submitted to the jury on the theory that if the motorman saw, or in the exercise of reasonable care might have seen, that the plaintiff was in

a. SAME: negli-  
gence: last  
clear chance:  
submission  
of issue.

a position of danger from the approaching car, or was putting himself in such position of danger without noticing the approach of the car, and while he might in the exercise of reasonable care have stopped the car before injuring the plaintiff, then the defendant was liable notwithstanding the negligence of the plaintiff in putting himself in such position of danger. The evidence justified the submission of the case on that theory, for, as already indicated, it tended to show that the motorman did see the plaintiff near the south track in such position that he was not likely to observe the approach of the car, and apparently not giving attention to such approach in time to enable the motorman to stop the car before it struck the plaintiff. It must have been reasonably apparent to the motorman that the object of the plaintiff in carrying the end of his trough to the east and south was to clear the north track, and as no car was in sight coming from the west, the jury may well have found that the apparent purpose of plaintiff was to pass to the south track, or so near it as to be in a position of danger from the approaching car in order to clear the north track for the supposed approach of this car coming from the east.

While it is true that a motorman is not bound to anticipate that a person not already in a position of danger from the approaching car will negligently put himself in such position of danger, yet when the motorman sees that a person on the street is apparently placing himself in a position of danger without being aware of the approaching car, it is plainly his duty to take cognizance of that fact and avoid injury to him if practicable, and we have

recognized the rule that under such circumstances the negligence of the person in danger, which has thus become apparent to the motorman, will not relieve the street car company from liability for the negligence of the motorman in not taking reasonable precautions to avoid an accident. *McCormick v. Ottumwa R. & L. Co.*, 146 Iowa, 119. In that case it was found that under the evidence the motorman could not have reasonably anticipated that the person injured was about to go upon the track ahead of the approaching car in time to have avoided injury to him, but in *Kelley v. Chicago, B. & Q. R. Co.*, 118 Iowa, 387, cited with approval in the case last above referred to, and which is analogous in view of the fact that the engineer in charge of the engine saw the person who was in danger on the track negligently failing to keep any watch for the approaching engine, it was held that notwithstanding the negligence of the person on the track the railway company was liable if the engineer failed to use reasonable care in avoiding injury to him.

In view of the application of the doctrine of the last clear chance which we have thus recognized, we see no error in the submission of this case to the jury on the theory on which it was submitted. Such theory

3. SAME: last  
clear chance. does not involve a recognition of liability in case of concurrent negligence, nor does it involve any case of comparative negligence. The motorman was bound to use reasonable care not to injure the plaintiff in the condition in which the plaintiff had placed himself, even though he was guilty of negligence in thus putting himself in a position of danger which he might have avoided by reasonable precautions. In the recent case of *Brugeman v. Illinois Cent. R. Co.*, 147 Iowa, 187, the court was divided in opinion as to whether the doctrine of the last clear chance was applicable under the facts. The majority of the court held that in the application of that doctrine it is not necessary to find that the negligence of



the injured person had ceased to operate before the accident occurred, and that it was sufficient to call that doctrine into play if the defendant's employee knew of the danger in time to have avoided injury to the person in peril in the exercise of reasonable care, even though he was negligent in putting himself in a place of danger and continued to be negligent in not looking out for his own safety. The judge who dissented from this statement of the rule expressed the view that the plaintiff in such a case could invoke the doctrine of the last clear chance only on the theory that, if his intention to go into a position of danger became apparent to the engineer operating the approaching engine in time to have enabled him in the exercise of ordinary care to stop his engine, it was negligence not to do so. The theory on which the case now before us was tried seems to have been in accordance with the views of this court expressed in several cases, and not contrary to any views expressed in any of the cases on this subject, and, as there was sufficient evidence to support the finding of the jury for the plaintiff on this theory, we should not interfere with the judgment.

There is a further contention on the part of the appellant that the verdict of \$17,000 was so manifestly excessive as to indicate passion and prejudice requiring the setting aside of the verdict *in toto*, and not merely its reduction in amount. Without setting out in detail the evidence as to the extent of plaintiff's injuries, which we think under the circumstances to be wholly unnecessary, we are content to say that the trial court may well have found that the verdict was excessive, not on account of any passion or prejudice with reference to plaintiff's right to recover, but only on account of a misconception on the part of the jury as to what should be allowed under proper rules as to the measure of damages, and therefore we are not willing to

4. EXCESSIVE  
DAMAGES:  
reduction of  
verdict.

hold that the court erred in allowing the verdict to stand for a reduced amount.

Finding no error in the record, the judgment is affirmed.

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CANFIELD LUMBER COMPANY, Appellant, v. KINT LUMBER COMPANY and W. F. KINT, Appellees.

**Evidence:** CROSS-EXAMINATION: NONPREJUDICIAL ERROR. Where the  
1 plaintiff, as in this case, attempted to show by its president and  
managing officer a loss of business resulting from defendant's  
breach of contract, the overruling of an objection to a question  
on cross-examination tending to show that domestic troubles of  
the witness were responsible for plaintiff's loss of business was  
not prejudicial, in view of a denial of such trouble, even though  
the question may have been improper.

**Contracts:** RESTRAINT OF TRADE: EVIDENCE. In this action for breach  
2 of contract of the sale of a business with an agreement not to  
reengage therein, the question of whether the agreement not to  
reengage in the business was made for the purpose of advancing  
a combination to control prices is held under the evidence to  
have been for the jury.

**Same:** PAROL EVIDENCE OF AGREEMENT. A contract may be partly in  
3 writing and partly in parol, and where a conflict is not thus pre-  
sented or the same subject covered, parol evidence is admissible  
to show the entire agreement.

**Same:** BREACH BY ONE PARTY: DISAFFIRMANCE BY THE OTHER. Where  
4 a contract partly written and partly oral is not severable and one  
of the parties refuses performance on his part the other may  
also disregard and disaffirm it; he is not required to sue for  
the other's breach.

**Same:** INSTRUCTION. An instruction in this action regarding defend-  
5 ant's right to disaffirm the contract upon plaintiff's breach thereof  
is held to have been correct.

*Appeal from Cedar Rapids Superior Court.*—HON. JAMES  
H. ROTHROCK, Judge.

FRIDAY, JULY 8, 1910.

ACTION at law to recover damages for breach of a contract of sale of defendants' rights to certain leased ground, and for breach of an agreement not to reengage in the retail lumber and coal business in the city of Cedar Rapids for the period of ten years. Defendant pleaded plaintiff's breach of contract as a ground for a rescission thereof, and also alleged that the contract made with plaintiff was unlawful and contrary to public policy. The case was tried to a jury, resulting in a verdict for defendants, and plaintiff appeals.—*Affirmed*.

*Redmond & Stewart*, for appellant.

*Crosby & Fordyce*, for appellees.

DEEMER, C. J.—Plaintiff is a corporation engaged in the sale of lumber and coal in Cedar Rapids at retail. It had yards on the west side of the Cedar river, and in February and March of the year 1909 had proceeded to erect buildings thereon. Thereafter defendant, the Kint Lumber Company, acquired or claimed to have acquired, leases of railway grounds on the east side of the river for similar yards, and had purchased and unloaded some lumber and other goods thereon. Negotiations were instituted between representatives of the two companies, with reference to buying or selling the properties belonging to the respective companies, which finally resulted in a written contract of which the following is a copy:

Cedar Rapids, Iowa, April 10, 1908. To the Canfield Lumber Company, Cedar Rapids, Iowa.—In consideration of One Thousand Dollars, the receipt of which is hereby acknowledged, I hereby surrender all my rights in any and all leases made to me by the Chicago, Rock Island & Pacific Railway Company, and the Illinois Central Railway Company, and any other lease or option I possess to any piece of property or properties in Cedar Rapids, Linn county,

state of Iowa, for the purpose of placing a lumber and coal yard on same. I further hereby agree, and bind myself not to directly or indirectly, through any company or person in which I have an interest, to engage in the retail lumber and coal business in Cedar Rapids, Iowa, nor to sell by carload to any person, or persons, or company not known and recognized as retail lumber and coal dealers in the city of Cedar Rapids, Linn county, Iowa, or in the vicinity competitive to said place for a period of ten (10) years from above date. All of the above I voluntarily agree to for the consideration above mentioned. Witnesseth my signature this tenth day of April, 1908. Kint Lumber Co.

Two hundred dollars was paid by plaintiff under this contract, but it is contended that within a month or six weeks thereafter defendants, in violation of their said contract, proceeded to and did establish a lumber and coal yard. Defendants claim that the written contract did not embody the entire terms of the agreement between the parties. They say that when it was made defendants had forty or fifty cars of lumber ordered which orders were to be canceled, so far as possible, and that it was part of the arrangement and agreement between them that plaintiff was to accept and take all the cars of lumber which defendant had ordered, and which might be shipped before cancellation of the orders could be made. They further alleged that two cars were shipped before cancellation could be made or accepted, which plaintiff refused to accept or pay for and that by reason thereof defendants were released from any liability on their part under the written agreement. Plaintiff says that parol evidence of such oral agreement was inadmissible; that such agreement, if made, was without consideration and was made after the written contract was fully consummated; that, in any event, it was only obliged to take such lumber as had been shipped when the written contract was made, and then only upon invoices furnished by defendants and orders upon the railway company to deliver, turned over to plaintiff; that none of

these things were done, and that defendants are liable for breach of the written contract.

The appeal presents four propositions: First, that testimony as to the alleged parol, contemporaneous agreement was inadmissible; second, that even if such testimony were admissible and a breach of the parol contract proved, this would not justify a rescission by defendants; third, that the court erred in permitting certain interrogatories to be propounded to one of plaintiff's witnesses; and fourth, that the court erred in submitting the question of the invalidity of the contract to the jury.

We shall first take up the rulings on the admission and rejection of testimony. One Canfield was a witness for plaintiff and attempted to show plaintiff's loss of business, which he attributed to defendant's breach of contract. On cross-examination he was asked if he had not had trouble with his wife, and was accused, in the newspapers, of beating her. This was objected to, but the objection was overruled. In view of the answers given by the witness no prejudice resulted, even if the questions were improper. Had they been answered in the affirmative, that fact might have had some bearing upon plaintiff's loss of trade, for the reason that witness was plaintiff's president and managing officer.

Instruction No. 5 is complained of. It reads as follows: "If you believe from the evidence that the purchase by plaintiff of the lumber business of the defendant, with a condition that the defendant should not reengage in the lumber business in Cedar Rapids for a period of ten years, was made by the plaintiff in aid of or to advance a combination to control the prices of lumber in the city of Cedar Rapids, then such condition was void, as against public policy, and your verdict should be for the defendant." The point made against it is that there was no testimony to justify the submission of that issue to the

1. EVIDENCE:  
cross-examina-  
tion: nonpre-  
judicial error.

2. CONTRACTS:  
restraint  
of trade:  
evidence.

jury. In this counsel for appellant are in error. There was testimony from plaintiff's manager and president as follows: "In our talk down on Ninth Avenue and Third Street on the East Side, he said he could fix up with the other yards if I would stay out of business here, and make some money, and he said: 'If you come in here and fight I couldn't make anything.' In conversation between myself and Canfield at the corner of Third Street and Ninth Avenue, the plaintiff stated that it was going to ruin the lumber business, if both of us went in at the same time. He said he could fix it up with the other lumber yards. He said he could fix it up if I would stay out of business here. He could fix it with the other yards and fix the prices; that he could fix it up with them, if I would stay out of the business, and make same money. He said: 'If you go in and fight, I couldn't make anything.' We were talking about prices." This was enough to take the issue to the jury.

II. The main contention is over the right of defendants to prove the parol agreement relied upon by them to the effect that plaintiff was to take and pay for lumber ordered. We are constrained to hold that

3. SAME: parol evidence of agreement.      this testimony does not vary the contract or change any of the terms of the original agreement, and that it was admissible. A contract may be partly in writing and partly in parol, and unless there be a conflict between them or they cover the same subject-matter, parol evidence is admissible to show the entire agreement. The rule with its exceptions is well stated in Elliott on Evidence, section 576 as follows:

A contract partly written and partly parol is generally regarded as a parol contract to which the parol evidence rule does not apply. If the writing does not purport to be complete, but is a mere memorandum or merely purports to contain some of the stipulations between the parties, parol evidence is clearly admissible to show such

additional stipulations as are not inconsistent with the writing. But most of the authorities, while admitting that intrinsic evidence is admissible, when not inconsistent with the writing, where the contract appears to be a mere incomplete memorandum or to be partly in writing and partly in parol, draw a distinction and hold that it is only admissible when that part of the contract sought to be thus established relates to some matters about which the writing is silent, and that if the proposed evidence is in any way inconsistent with the terms of the writing, such evidence is inadmissible. 'Two things,' it is said by the New York Court of Appeals, 'are essential to bring a case within this class: (1) The writing must not appear upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties for in such a case it is conclusively presumed to embrace the entire contract. (2) The parol evidence must be consistent with, and not contradictory of, the written instrument.' The question as to whether the writing is the complete contract of the parties is usually determined from the writing itself, but it may, we think, at least in case of ambiguity and doubtful completeness, be read in the light of surrounding circumstances, and if when so read it is apparent that it does not contain all the stipulations of the parties and does not embody their entire contract, parol evidence is admissible, in a proper case, to bring the entire contract before the court.

See, also, Wigmore on Evidence, sections 2430 and 2431; also, *Hall v. Barnard*, 138 Iowa, 524; *Sutton v. Weber*, 127 Iowa, 361. Moreover plaintiff without objection, first introduced testimony as to his parol agreement, and having thus opened the door, he can not complain of defendant's testimony relating to the same matter. *Bank v. Snyder*, 79 Iowa, 191.

III. The contract, written and oral, was not a separate or severable one, and if the jury found that plaintiff refused performance on his part, this justified the defendant in disregarding it. *Wernli v. Collins*, 87 Iowa,

548; *Miller v. R. R.*, 132 Iowa, 412; *Hale v. Sheehan*, 52 Neb. 184 (71 N. W. 1019). Defendant was not, as plaintiff's counsel contend, bound to sue for plaintiff's breach, but might disregard and disaffirm the contract himself.

IV. Instruction 2, given by the trial court, reads: "If you believe from the evidence that, as a part of the contract entered into between the plaintiff and the defendant for the sale by the defendant to the plaintiff of his lumber business, it was agreed by the plaintiff that it would take and receive the lumber which had then been ordered by the defendant to be shipped to him at Cedar Rapids, Iowa, and that he refused to accept two cars of lumber which had been so ordered, then your verdict should be for the defendant, unless you find from the evidence, under the instruction hereinafter given, that the plaintiff was justified in refusing to accept the same." This is challenged in a half-hearted way, but we think it is correct. There was sufficient evidence to take the case to a jury, and although it is in conflict, the questions at issue were for the jury, and with its verdict we should not interfere.

The judgment must be, and it is, *affirmed*.

### W. A. REYNOLDS V. PHIL PRAY, Appellant.

**Brokers:** AGREEMENT TO SHARE COMMISSIONS: EVIDENCE. In this action by one real estate broker to recover a portion of the commissions received by another broker, in consideration of the privilege granted defendant to use plaintiff's office for the transaction of business, the evidence is held sufficient to authorize recovery.

**Same:** ACCEPTANCE OF PROPOSITION TO DIVIDE COMMISSIONS. Where, as in this case, plaintiff alleged an express promise of defendant to divide commissions arising out of business secured through plaintiff's office, in consideration for the use of his office, acceptance of the proposition will be inferred from a continued en-



joyment of the privilege without an express allegation of acceptance.

**Damages:** SUBMISSION OF ISSUE: HARMLESS ERROR. Where the verdict should either have been for plaintiff in a stated sum or for defendant and the jury allowed plaintiff less than such sum, the defendant was not prejudiced by the error, if any, in permitting the jury to determine the amount.

**Evidence:** HEARSAY: MOTION TO STRIKE. A motion to strike evidence on the ground of hearsay, which is directed to the entire answer of a witness, part of which is competent, should be overruled; but where the motion points out the precise portion of the answer subject to the objection it should be sustained.

*Appeal from Linn District Court.*—HON. W. N. TREICHLER, Judge.

FRIDAY, JULY 8, 1910.

ACTION for share in commission earned by defendant in a real estate transaction resulted in judgment for plaintiff. The defendant appeals.—*Affirmed.*

*Deacon, Good, Sargent & Spangler*, for appellant.

*Randall, Courtney & Harding*, for appellee.

LADD, J.—The plaintiff had been a real estate agent for many years with offices in Cedar Rapids. The defendant, a friend of many years, dropped into the office frequently and sometimes made use of the telephone. According to plaintiff's testimony, and it is somewhat corroborated, after making use of the office and telephone, defendant would say, "Now, Reynolds, if I ever get a deal in your office, I am going to divide commissions with you." The defendant denies this, but the jury might have found that on this basis he was accorded and accepted the privileges of the plaintiff's office. The circumstances were such as not

1. BROKERS:  
agreement  
to share  
commissions:  
evidence.

to leave the meaning of "deal" in doubt. Both were engaged in effecting for themselves or others the sale or exchange of real estate, stock of goods, and other property, and plainly enough the term employed had reference to such a transaction. Webster's Dictionary defines "deal" as "an arrangement to attain a desired result by a combination of interested parties." But for some understanding of the kind, plaintiff would not be protected against interferences with prospective customers who might come to his office. Thereby, for the privileges of his office, he was to share in compensation earned in deals subsequently consummated which originated there. The acceptance of the proposition was to be implied from acquiescing in defendant's subsequent enjoyment of the privilege, in consideration for which he promised to share commissions. The jury might have concluded that the deal had its inception in plaintiff's office. That Bowder was not Heath's agent can make no difference. It was enough if, as employee of an agent of Heath, he presented a customer at plaintiff's office to whom the stock of goods listed with defendant was subsequently exchanged. Nor is it of consequence that the first proposition of Iowa land failed, if the exchange of the stock of goods for the Nebraska land was the result of negotiations then begun. The stock of goods had been listed with defendant for exchange generally, and the trade was to a customer furnished through the introduction of Bowder at plaintiff's office and arrangements for a meeting there made, as the jury might have found, and, if so, the deal was gotten at said office within the meaning of the parties. Nor is there any basis for the contention that the exchange was effected under a subsequent employment by the owner of the stock of goods. There may have been a conversation between such owner and defendant to the effect that he was to assist in the exchange for the Nebraska land, but there is no pretense that the former agency had been terminated, or that the customer for the stock of goods was

not found by defendant, and there was evidence enough to warrant the conclusion that this was through the introduction to and arrangement with Bowder in plaintiff's office.

II. The court submitted the issue as to whether the trade was commenced or conducted in plaintiff's office, and it is argued that as there was no evidence that it was conducted there, this was error. The trade was not discussed there farther than to arrange for a meeting the next morning, and the court must have had reference to the making of this arrangement. Nothing else could have been so construed, especially inasmuch as no claim was made in the petition or in the testimony on the theory that negotiations were conducted there, and we are satisfied the jury could not have interpreted the instructions otherwise.

The fourth instruction requested was rightly refused for that it directed that there must have been an express acceptance of the defendant's agreement to pay for the privileges of the office. The petition alleged

2. SAME:  
acceptance of  
proposition  
to divide  
commissions.

an express promise on defendant's part but is silent as to the nature of the acceptance, which, as we have said, was to be inferred from acquiescence in the continued enjoyment of its privileges.

Lastly the paragraph of the charge submitting forms of verdict is criticised in that the jury was told to insert the amount allowed, if the verdict should be for plaintiff.

This, it is argued, left the amount to be determined to the jury. Without so deciding, suppose it did? The court instructed the jury that unless an agreement such as mentioned was entered into, there could be no recovery. The commission earned by defendant was \$350, so that the verdict should have been for \$175, or for defendant. The jury found for plaintiff and yet allowed him but \$75. To criticise the jurors for so doing is hardly gracious in appellant, as the

3. DAMAGES:  
submission of  
issue: harm-  
less error.

error was in his favor and could not well have been prejudicial.

III. An answer, in part hearsay, was made to a pertinent inquiry, and exception is taken to a ruling by which the court refused to strike the same. Had the motion been

4. EVIDENCE:  
hearsay:  
motion to  
strike.

directed specifically at that portion which was hearsay, it should have been sustained.

It sought to exclude the entire answer and, for this reason, the ruling must be upheld. It is no part of the court's duty to pick out objectionable parts of the evidence when asked to strike the whole of it from the record. Such a motion, if any of the evidence is unobjectionable, properly may be overruled. In response to an inquiry as to whether he ever heard defendant say that he had not met Bowder in plaintiff's office, Engberg answered: "I never heard Mr. Pray say so, that he met Bowder; Bowder told me he met Mr. Pray." Defendant moved to strike out the last sentence as hearsay, but the motion was overruled. The statement was plainly hearsay. The motion pointed out the precise portion of the answer subject to objection. It should have been sustained. But Bowder had so testified, and that he had told Engberg the same thing added little or nothing to the weight to be accorded his account of the transaction. We are inclined to regard the ruling as without prejudice.—*Affirmed.*

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O. M. PARKINSON, Appellant, v. PETER KORTUM.

**Torts:** REMOTE AND SPECULATIVE DAMAGES: EVIDENCE. While it may  
1 be necessary to show that the injury resulting from a wrongful act was one that might have been reasonably anticipated, still there can be no recovery in the absence of proof that the injury resulted as a consequence of the wrongful act. In this action involving a counterclaim by the husband for damages resulting from the claimed personal injury to his wife, the evidence that the injury complained of was the result of plaintiff's wrongful act

is held insufficient to authorize submission of the counterclaim to the jury.

**Landlord and tenant: FRAUD: EVIDENCE.** A tenant who has paid 2 as rent a specified price per acre for a stated number of acres of land, as fixed by the terms of his lease, can not recover back any portion of the rent so paid on the ground that there was in fact a less number of acres, without showing that the lessor at the time of the execution of the lease fraudulently represented the quantity of land, that he relied thereon and that the representations were with intent to defraud him.

*Appeal from Lyon District Court.*—HON. WM. HUTCHINSON, Judge.

FRIDAY, JULY 8, 1910.

ACTION to recover damages for failure of defendant as plaintiff's tenant to deliver to plaintiff his proper share of the crops raised on the leased premises. By answer, the defendant interposed a denial of the allegations of the petition, and also two counterclaims, one for damages resulting from threats of personal injury to defendant's wife, causing premature delivery of a child and her insanity as a consequence, and the other for the recovery back of overpayments made by defendant to plaintiff on account of rent. On the trial to a jury of these and other issues not material on this appeal, there was a general verdict for defendant and from judgment on this verdict plaintiff appeals.—*Reversed.*

*E. C. Roach*, for appellant.

*S. D. Riniker*, for appellee.

McCLAIN, J.—There was evidence tending to sustain plaintiff's claim that defendant had not delivered one-half the corn crop raised on the leased premises by defendant during the year 1908, as required by the lease, and as,

under the instructions, the jury might have returned a general verdict for defendant under a finding that the damages suffered by defendant under one or the other of his counterclaims was equal to the damage suffered by plaintiff in being deprived of his proper share of the corn crop, it is necessary to determine whether the two counterclaims above described were properly submitted to the jury.

I. The counterclaim relating to injury to plaintiff's wife, depriving him of her companionship and help, was not predicated upon actual, physical injury directly resulting in permanent or temporary disability, but on fright and shock occasioned by threats and physical violence which produced a premature delivery of a child, in consequence of which defendant's wife became partially insane, and thereby incapable of caring for her children and affording companionship to her husband. The contention of plaintiff on the trial was that the alleged damages of this character were too remote and speculative, and not the proximate result of the acts of the plaintiff from which the alleged damage accrued, and that there was no evidence justifying the submission of this counterclaim to the jury.

The testimony relied on for appellee tended to show that on one occasion when a man by the name of De Vaul was assisting the plaintiff in taking away some planks from the dooryard of the house on the leased premises occupied by defendant's family, defendant's wife came out of the house, requested De Vaul not to carry away a certain plank, and took hold of one end of it for the purpose of assisting him in putting it back where it had been used to walk on, and that thereupon plaintiff, who was near by, came toward defendant's wife in a threatening attitude, saying that he wanted the plank, and taking hold of it, gave it a twist so as to bump against the woman's side, at the same time slipping and falling so that his face was cut on nails which were in the plank. Defendant's wife

1. TORTS:  
remote and  
speculative  
damages:  
evidence.

did not at this time manifest any pain or suffering as the result of violence, and continued for some minutes in conversation with De Vault after plaintiff had withdrawn from the scene. But according to the testimony of her children who were present, she soon after went into the house and commenced to act in an hysterical manner, laughing and crying alternately, and continued to show hysteria at intervals until ten days afterward, when she was delivered of a child which lived but a few hours.

This was in October, and she continued to show symptoms of mental disturbance until January, when a physician was called to examine her, and found her to be suffering from a derangement which continued until the trial. In the meantime the defendant had removed his family to a farm in South Dakota. He had not placed his wife in an asylum, but she continued to carry on her household work, though with greatly impaired efficiency. The doctor who attended at the confinement, making two visits, did not discover any signs of mental derangement, and his attention was not called to any peculiarities of conduct on the part of the wife, but both he and another physician, examined as experts, testified that the derangement might have been due to the excitement produced by the controversy with plaintiff and the impact of the plank against the woman's side or abdomen, causing a premature delivery.

It is not contended for appellee that the wife's mental derangement was the direct or immediate result of fright, shock or physical injury occasioned by the acts of appellant. There is some evidence that she became somewhat hysterical, and that her mind dwelt upon the wrong and indignity done her, as she conceived, by him. But there is no evidence that if the birth and subsequent death of her child had not intervened, this condition of excitement and hysteria would have developed into insanity. The argument of appellee is necessarily predicated upon the assumption that the jury might have found the birth of the

child to have been premature, and that this premature birth caused or contributed to the insanity which followed.

Now there is no evidence whatever which the jury could properly have considered tending to show that the delivery of the child was premature, or otherwise unnatural, in consequence of any act of appellant, or hysterical condition which may have followed it. The doctor who attended the delivery testified that to all appearances it was in the ordinary course of nature. There is some evidence that the child was not robust, but none whatever that its condition could be reasonably attributed to any injury to the wife, or any condition that resulted from appellant's act. Indeed, there is no evidence whatever that the delivery was premature. The only testimony relied upon for appellee as to this fact is that of a woman who attended the wife that the wife said she was afraid she was going to be sick, and "she wasn't looking to be sick for another month." Counsel for plaintiff moved that this answer be stricken out because hearsay. Although exception was taken to this ruling, and it is formally assigned as error, yet this particular assignment has not been pressed in argument. Nevertheless, it was for the court below to determine whether there was any proper evidence on which the jury could find a premature delivery, and as we think there was no such evidence, we hold it to have been error in the trial judge to assume in his instructions to the jury that it might be found from the evidence that there was an abortion and insanity resulting therefrom.

The doctors testifying for defendant as experts on cross-examination admitted that the derangement might have been due to various other causes, such as pregnancy, or mental disturbance following the birth of the child, or to the woman's approaching change of life, as she was forty-two years of age when the child was delivered. We may concede, as counsel contend, that it is not necessary



to show the injury actually resulting from a tort, which consists in an affirmative act of wrong and not merely in negligence, to have been one which might reasonably have been anticipated. *Anderson v. Schurke*, 121 Iowa, 340; *Cowan v. Western U. Tel. Co.* 122 Iowa, 379; *Black v. Minneapolis & St. L. R. Co.*, 122 Iowa, 32; *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Co.*, 130 Iowa, 123; *Lapleine v. Morgan's L. & T. R. & S. Co.*, 40 La. Ann. 661 (4 South. 875, 1 L. R. A. 378); *Rodgers v. Missouri P. R. Co.*, 75 Kan. 222 (88 Pac. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416); *Cole v. German Sav. & L. Soc.*, 124 Fed. 113 (59 C. C. A. 593, 63 L. R. A. 416). But as there is no evidence that insanity resulted immediately as the consequence of appellant's wrongful act, or that there was a premature delivery resulting from such act which may have tended to produce insanity, we reach the conclusion that this counterclaim was improperly submitted to the jury.

II. The counterclaim based on overpayment of rent was predicated upon the following state of facts which the evidence tended to establish. The lease provided that in addition to a share in the crop, the plaintiff should have a cash rent of three dollars per acre for all grass and hay land, and contained a provision that "if any breaking is done, party of the second part (the defendant) must seed down corresponding number of acres to grass. Amount of grass is now one hundred and seventy-six acres." The defendant paid cash rent on this basis for four years, but after the controversy between him and the plaintiff resulting in this lawsuit had arisen, he caused the hay and grass land which consisted principally of an irregular tract of slough land extending entirely through the farm to be surveyed, and found that it contained only one hundred and sixty-three acres.

2. LANDLORD AND  
TENANT:  
fraud:  
evidence.

The counterclaim is based on fraud and misrepresenta-

tion of the plaintiff as to the acreage of the grass and hay land. No other representation than that contained in the portion of the lease above quoted appears to have been made, and there is no evidence whatever that this representation was known or supposed by the plaintiff to be false, and there is an entire absence of any showing on which an action for deceit could be predicated. *Holmes v. Clark*, 10 Iowa, 423; *Boddy v. Henry*, 113 Iowa, 462; *Boddy v. Henry*, 126 Iowa, 31. The cases relied upon by appellee are those in which there was evidence tending to show that the representation was, to the knowledge of the person making it, false.

The court instructed the jury specifically that no recovery should be allowed defendant on this counterclaim, unless they were satisfied by the preponderance of the evidence that at the time the lease was made the plaintiff knowingly, purposely and fraudulently represented to defendant that there were one hundred and seventy-six acres of grass and hay land, whereas, in truth and fact, there were only one hundred and sixty-three acres thereof, and that defendant relied upon the statements so made by plaintiff, and that they were false and fraudulent, and made with intent of deceiving and defrauding defendant. We think this instruction correct, but we find no evidence in the record to sustain the burden thus imposed on the defendant.

For the errors pointed out, the judgment is *reversed*.

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REACKE BACK, Appellant, v. AMIEL J. BACK, Executor of the Estate of WILLIAM BACK, Deceased.

**Pleadings:** EFFECT OF ADVERSE RULING ON DEMURRER. Pleading over  
1 after an adverse ruling on demurrer is not, under our present statute, a waiver of the right to subsequently raise the same questions in some other manner.

**Marriage and divorce: RELATIONSHIP BY AFFINITY: TERMINATION.**

- 2 Relationship by affinity terminates by the termination of the marriage which gave rise to the relationship, when it occurs either by death or divorce. So that the marriage of a man to the daughter of his divorced wife by a former marriage is not invalid, because within the prohibited degrees of affinity as defined by Code, section 4936.

*Appeal from Ida District Court.*—HON. Z. A. CHURCH,  
Judge.

SATURDAY, APRIL 9, 1910.

IN a probate proceeding for the settlement of the estate of William Back, deceased, plaintiff alleged that she was the widow of the decedent, and asked an order directing the executor to turn over and deliver to her all his exempt personal property. Issue being joined as to whether the plaintiff was the widow of decedent, the court made a specific finding that plaintiff never was the legal wife of said decedent, and was never legally married to him, and therefore dismissed plaintiff's application and entered judgment for the defendant for costs. From this judgment, the plaintiff appeals.—*Reversed.*

*J. B. Tourgee* and *Johnston Bros.*, for appellant.

*M. M. White* and *W. A. Helsell*, for appellee.

McCLAIN, J.—The facts out of which this controversy arises are not in dispute, being settled by stipulation of the parties appearing in the record. So far as we deem them material to a disposition of the case, they are as follows: In 1890, William Back, the decedent, married a widow, one Mrs. Dirke, who then had living a daughter by her former husband. The daughter is the plaintiff in this case, In 1900, the wife obtained a divorce from said William

Back, and four years later he married the plaintiff. No children were born to William Back by his first marriage, but as a result of his marriage to plaintiff four children were born, all of whom survive him. About two years after the second marriage the divorced wife, mother of the plaintiff, died, and thereafter plaintiff and the decedent continued to live together as husband and wife until his death in 1906. The resistance of defendant to plaintiff's application as widow to have the exempt property set apart to her was on the ground that the marriage was incestuous and void under the provisions of Code, section 4936, which within the definition of "incest" includes marriage between a man and his wife's daughter, and prohibits such marriage. The trial court ruled throughout that, notwithstanding the termination by divorce of the marriage between decedent and plaintiff's mother before the marriage of decedent to this plaintiff, plaintiff continued to be decedent's wife's daughter within the statutory definition, and that the marriage to plaintiff was void in its inception and continued to be void after the death of plaintiff's mother and until the death of decedent, and that, therefore, plaintiff is not the widow of decedent. Before reaching the question as to the correctness of this ruling of the trial court, it will be necessary, however, to pass on a question of practice for the purpose of determining whether such ruling is properly before us for review.

I. Defendant's answer fully set out the facts on which was based the claim that the marriage of decedent to this plaintiff was void, and the demurrer of plaintiff to such answer distinctly raised the question whether it was prohibited under the statute already referred to. This demurrer was overruled, and the plaintiff by standing on her demurrer and submitting to judgment might on appeal have had that question adjudicated in this court. Had she done so, a decision in this court affirming the ruling on the demurrer

1. PLEADINGS:  
effect of  
adverse ruling  
on demurrer.

would have concluded the controversy, and plaintiff would have had no opportunity to raise any other questions of law or fact in the case. She evidently desired, however, to raise other issues and have them adjudicated, and therefore, instead of standing upon her demurrer, she filed a reply in the first division of which she alleged the same facts as to the marriage of decedent to Mrs. Dirke, the procuring of a divorce by her from him, and the second marriage of decedent to this plaintiff, no issue having resulted from the former marriage, as fully as such facts had been already stated in defendant's answer, but with the legal conclusion that she was the due and legal wife of decedent, and entitled to participate as his widow in the estate of said decedent, and in other divisions of her reply she alleged facts relied upon as constituting an estoppel of defendant to assert the invalidity of the marriage. Thereupon the defendant demurred to each division of the reply, challenging the sufficiency of the facts pleaded in the first division thereof as constituting a sufficient reply to defendant's answer for various reasons, one of which was that the facts so alleged were fully set out in the answer to which the reply was filed, and had been held sufficient as a defense by the ruling on the demurrer thereto. This demurrer of defendant to plaintiff's reply was sustained. Thereupon the case came on for trial on the issue arising as to the truth of the facts alleged in defendant's answer which were by our rules of pleading deemed denied by operation of law. By stipulation the plaintiff admitted the facts to be as alleged in defendant's answer, but objected to their being considered in evidence, for the reason substantially that they did not tend to show the invalidity of the marriage between plaintiff and decedent; and this objection was by the court overruled. Thereupon plaintiff offered evidence by way of stipulation as to the facts tending to support the allegations of her reply in estoppel, to the consideration of which defendant objected on the ground

that such facts did not tend to support any issue in the case, and this objection was by the court sustained. The court then sustained a motion for defendant on the record to render judgment in his favor for costs, and entered a judgment to that effect, in which it was recited that plaintiff never was the legal wife of decedent, and was not entitled to recover under the law as his widow and dismissed plaintiff's application.

The contention of appellee now is that appellant by filing the reply after her demurrer to the answer had been sustained waived any error in such ruling, and can not now rely upon such alleged error as a ground for reversal. The rule which was well established by earlier decisions of this court, to the effect that, by amending or pleading over after a ruling on a demurrer, the unsuccessful party waived any error in such ruling, had the manifest result of depriving him of an opportunity to insist upon an error of law committed in a ruling on a demurrer if he by amendment stating additional facts relied upon as constituting a cause of action, or by pleading additional matters of defense or reply, sought to raise other issues than those arising on the pleadings as they stood at the time the ruling against him on demurrer was made. For instance, the defendant could not question the legal sufficiency of the allegations of plaintiff's petition, and also question their truth. If he demurred to their sufficiency, and his demurrer was overruled, and standing on his demurrer judgment was entered against him, he could not afterward, when by appeal it had been determined that the ruling on demurrer was correct, get back into court for the purpose of contesting the truth of the allegations; while, on the other hand, if he relied subsequently on a denial of the truth of the allegations and went to issue on the facts, he could not on appeal question the correctness of the ruling on the demurrer, for any error in such ruling would have been waived by pleading over. By amendatory legislation incorporated now into Code,

section 3564, it was the evident purpose of the Legislature to abolish this rule so inconsistent with our system of pleading, by which either party is allowed to raise every issue of law and fact inhering in the case, and to have every ruling prejudicial to him reviewed on appeal. By that section it is provided that a ruling on demurrer shall not be considered as an adjudication of any question raised by the demurrer and the sufficiency of the pleading may thereafter be determined as if no demurrer had been filed, and no pleading shall be held sufficient on account of a failure to demur thereto. Under these provisions, it has been repeatedly held that a ruling on demurrer does not become the law of the case, and the same question may be raised at subsequent stages of the procedure as though no such ruling had been made. *Marshall Ice Co. v. La Plant*, 136 Iowa, 621; *Watkins v. Iowa Cent. R. Co.*, 123 Iowa, 390. There seems to be no difficulty in holding in this case that the plaintiff subsequently raised the same question which was raised by the demurrer to the answer. She objected to the evidence tending to substantiate the allegations of the answer on the ground that the facts did not constitute any defense, and she excepted to the judgment in which the court specifically found that they did constitute a defense. Under repeated decisions of this court, it is the established rule following the statutory provisions above referred to that pleading over after ruling on demurrer does not waive the right to raise the same objection in some other manner. *McClain v. Capper*, 98 Iowa, 145; *Geiser Mfg. Co. v. Krogman*, 111 Iowa, 503. We reach the conclusion that plaintiff is not precluded from relying in this appeal on the insufficiency of the allegations of defendant's answer to constitute a defense.

II. The provision of the statute relied upon for defendant as rendering plaintiff's marriage to decedent void is in full as follows: "If any man marry his father's sister, mother's sister, father's widow, wife's mother, daughter,

wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter or sister's daughter; or if any woman marry her father's brother, mother's brother, mother's husband, husband's father's son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son or sister's son; or if any person, being within the degree of consanguinity or affinity in which marriages are prohibited by this section, carnally know each other, they shall be guilty of incest, and imprisoned in the penitentiary not exceeding ten years nor less than one year." Code, section 4936. It will be noticed that this is a penal statute, the primary purpose of which is to provide a punishment for marrying a person related within specified degrees of consanguinity or affinity, or carnal knowledge between persons related in such degrees. It does not purport to declare the status of persons who marry within the prohibited degrees, but by Code, section 3182, it is provided that a marriage may be annulled by a proceeding in court if it is between parties whose marriage is prohibited by law, and the only corresponding prohibition is that found in the criminal statute above quoted.

We shall not stop now to discuss the question whether a marriage between parties within the prohibited degrees of consanguinity or affinity is void or voidable only, but proceed at once to determine whether the marriage of plaintiff to decedent was within any of the prohibitions of Code, section 4936, and the determination of this question depends upon the construction of the words "wife's daughter" in that section. As the statute is penal, it should not be applied to any case which does not fall both within its letter and its spirit; and this rule of construction must evidently be followed for the purpose of determining the validity of a marriage, which it is contended is invalid

2. MARRIAGE AND  
DIVORCE:  
relationship  
by affinity:  
termination.



because the parties to it are within the prohibited degrees of relationship. If the statute purported to be a definition only of degrees of relationship within which marriage is prohibited, it might perhaps be argued with some plausibility that, as a man could not marry his wife's daughter while his wife was living and undivorced without committing bigamy, the object of including wife's daughter among those to whom a marriage is declared invalid was to prohibit such marriage after the death or divorce of the mother of such daughter; but, as the primary purpose of the statute apparent on its face is to punish carnal knowledge as between persons having the specified relationships as well as to punish marriage between them, it is quite evident that the enumeration of relationships is simply a method of stating more definitely what are the degrees of consanguinity or affinity rendering marriage or carnal knowledge between persons of the relationships named criminal. This is quite evident from the conclusion of the section which refers to the relationships named as being "degrees of consanguinity or affinity." Therefore, in determining the construction to be put upon the words "wife's daughter," we are required to determine their meaning as defining a degree of relationship by affinity between the parties. *Blodget v. Brinsmaid*, 9 Vt. 27; *Noble v. State*, 22 Ohio St. 541; *State v. Brown*, 47 Ohio St. 102 (23 N. E. 747, 21 Am. St. Rep. 790); *Wilson v. State*, 100 Tenn. 596 (46 S. W. 451, 66 Am. St. Rep. 789); *Johnson v. State*, 20 Tex. App. 609 (54 Am. Rep. 535); *Pegues v. Baker*, 110 Ala. 251 (17 South 943); *Tagert v. State*, 143 Ala. 88 (39 South. 293, 111 Am. St. Rep. 17); *Bigelow v. Sprague*, 140 Mass. 425 (5 N. E. 144); *Vannoy v. Givens*, 23 N. J. Law, 201; 1 Bishop, New Crim. Procedure, section 901; 26 Cyc. 845. Of the cases cited those from Texas, Alabama and Ohio are directly in point as relating to a marriage between a man and the daughter of a former wife deceased or divorced, and the

only discrepancy between them is that in the Alabama cases a modification of the rule is insisted upon, by which the relationship of affinity is held to continue after the dissolution of the marriage if and so long as there is surviving issue of such marriage. This qualification is suggested also in some of the other cases, but, as it appears in the case before us there was no issue of the former marriage between decedent and plaintiff's mother, the question need not now be determined.

We reach the conclusion, therefore, that the relationship of affinity between the decedent and plaintiff which existed during the continuance of the marriage relation between decedent and plaintiff's mother terminated when the latter procured a divorce from decedent, and after that time plaintiff was not the daughter of decedent's wife, and the marriage between them was valid.

This conclusion renders it unnecessary to determine the sufficiency of the allegations of matters in estoppel found in plaintiff's reply which were held to be insufficient by the lower court on demurrer.

The judgment of the trial court is *reversed*.

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URSULA S. YEAGER, Administratrix to the Estate of JOSEPH A. YEAGER, Deceased, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

**Evidence:** CONCLUSION. Not every inquiry calling for a fact in  
1 the nature of a conclusion is incompetent. Thus in an action for the death of a switchman the testimony of a competent witness that it is the duty of an engineer in moving his engine to keep a lookout ahead for cars with which he may collide is proper.

**Railroads:** ACTION FOR DEATH OF SWITCHMAN: CONTRIBUTORY NEGLIGENCE: EVIDENCE. In this action for the death of a switchman while riding the footboard of the engine which was pushing a car, the question of whether decedent was negligent in not being

on the car ahead of the engine and keeping a lookout instead of on the footboard of the engine was, under the evidence, for the jury.

**Same:** SUBMISSION OF ISSUES. Where, as in this action for the death  
3 of a switchman, it was not shown to be the duty of the yard master to direct the switching crew which track to take in transferring the car, but simply to tell them where to place the car and for them to determine the route, the issues of negligence based upon the omission of the yardmaster to give such instruction and the engineer's act in transferring the car without such direction should not have been submitted to the jury.

**Same:** NEGLIGENCE. While it was the duty of the switching crew to  
4 know upon which track they were moving the engine and car in question they were not necessarily negligent in using the track selected unless it was unsafe.

**Same:** NEGLIGENCE: EVIDENCE. In this action the question of whether  
5 the switching crew were negligent in failing to observe that they were upon a switch rather than the main track is held under the evidence to have been for the jury.

**Same:** CONTRIBUTORY NEGLIGENCE: INSTRUCTION. An employee may  
6 ordinarily rely upon a discharge of their duty by other employees; and in this action the instruction of the court when construed with reference to the evidence is held unobjectionable, as relieving decedent from the performance of his duty and entitling him to rely wholly upon a performance of the duties of his coemployees to keep a lookout for his safety.

**Same.** Where there was evidence, as in this case, that decedent's  
7 proper place was on the footboard of the engine, an instruction that he was bound to use ordinary care to place himself in a position where he might properly perform his work, which included a lookout for obstructions and signaling the engineer, he was negligent if he failed to do so, was proper in view of the evidence.

**Evidence:** CREDIBILITY OF WITNESS: INSTRUCTION. Although a com-  
8 mon test of the credibility of evidence is whether the same can be reconciled with the testimony of other witnesses, still, the court should not by instruction require the jury to reconcile the other evidence with impeached testimony in order to sustain it, if in doing so it is necessary to construe the credible testimony contrary to what the jury believes to be true.

**Negligence:** SUBMISSION OF ISSUE. It is reversible error to submit  
9 issues of negligence which have no support in the evidence.

*Appeal from Emmet District Court.*—HON. D. F. COYLE,  
Judge.

SATURDAY, DECEMBER 18, 1909.

ACTION for damages resulted in a judgment for the plaintiff. The defendant appeals.—*Reversed.*

*Carroll Wright, J. L. Parrish, and Crim & Morse,*  
for appellant.

*J. G. Myerly and M. J. Groves,* for appellee.

LADD, J.—The defendant's railroad extends in a north-westerly and southeasterly direction through Estherville, but is referred to by witnesses as running east and west. South of the main track are several side tracks numbered from one up from the main track. North of the latter is an elevator track. The Minneapolis & St. Louis Railroad crosses the main track east of the switchyard and is connected with it by a transfer track. In the evening of February 6, 1907, the deceased, Joseph A. Yeager, was engaged in switching cars as fieldman, while one Brisbin was following the engine which was manned by an engineer and fireman. The yard master, with this crew, had moved some loaded cars from the transfer track to side track No. 1, and, after leaving them near the east end of the said side track, returned to the depot at the west end of the yard; the engine being backed. Here the yard master directed the crew to get a coal car from the elevator track and take it to the transfer track and then return to side track No. 3, where he would meet them. For this purpose the engine backed down the main track, and was switched to the elevator track, where the coal car was coupled in front. The engine then was backed on the main track, pulling the coal car, and then moved forward pushing the coal car

through a switch, which had been left open, onto side track No. 1. The engine had no pilot, but was provided with a footboard at each end and also with grab irons. Both Brisbin and deceased appear to have ridden on these footboards during the progress of the engine. When moving forward on side track No. 1, Brisbin stood on the north end of the front footboard, and the deceased on the south end, and so continued as the engine moved to the east at a speed of from six to eight miles an hour. As it passed the switch, Brisbin directed the engineer to take the car to the transfer track, and, as some of the evidence tended to show, gave him a signal that he was to take it the entire distance and that the track was clear. The cars left on side track No. 1, were about one-half mile from the switch, and, as the engine approached, Brisbin signaled the engineer to slow up, but received no response, and within a few seconds the coal car collided with the first standing car and caused the death of Yeager.

I. Brisbin, and also the fireman after showing his competency, was asked what was the duty of an engineer when moving his engine as to keeping a lookout ahead,

1. EVIDENCE:  
conclusion.

and, over objection, answered that he was supposed to keep a lookout continually. Appellant assumes that this was an inquiry as to the duty of the engineer in the circumstances disclosed, and therefore called for a conclusion the jury alone could draw; but this is not so, save inferentially. The inquiry was of those qualified to speak as to what was the duty of an engineer in moving his engine, not this particular engineer, but anyone, and though calling for a fact in the nature of a conclusion, the evidence was admissible. *Quinlan v. Railway*, 113 Iowa, 89. The object of such testimony is to fix a criterion by which to measure the acts of the engineer whose conduct is under investigation. The jury might infer therefrom that it was the particular engineer's duty to keep a lookout continuously; but this

does not render the testimony obnoxious to the objection interposed.

II. Appellant contends that deceased was guilty of contributory negligence in that, as is said, instead of riding on the footboard of the engine, he should have been at the front end of the coal car keeping a lookout for obstructions on the track ahead. If, in the performance of his work, deceased owed this duty to defendant, the point would have to be conceded. As to that, however,

the evidence was in conflict. The defendant's rule provided that: "When cars are pushed by an engine (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need." Apparently the reason for the exception is that the engineer may have in mind the location of or be able to keep a lookout for obstructions on the track and enable the helpers to be where they can alight on the ground conveniently to throw switches or couple and uncouple cars and the like. Two witnesses called by plaintiff testified that deceased was in the proper and customary place; one of them explaining that it was only when two or more cars were being pushed that the fieldman was required to keep a lookout from the front car. Brisbin testified both ways, and several witnesses called by defendant were of opinion that deceased should have been on the coal car keeping a lookout. Manifestly the issue as to whether he should have been on the coal car or was where he should have been was for the jury. Possibly, owing to the height of the end boards on the coal car, he could not have seen ahead, without leaning out or getting off; but if at a place where, in the exercise of reasonable care, he might have been, he was not guilty of negligence. The evidence with reference to the customary place for the fieldman to ride when a car was being pushed was not introduced for the purpose of excusing

2. RAILROADS:  
action for  
death of  
switchman:  
contributory  
negligence.  
evidence.

negligence, but as tending to show that deceased, in the manner of performing his work, was in the exercise of ordinary care. *Pierson v. Railway*, 127 Iowa, 13. See *Boyce v. Wilbur Lumber Co.*, 119 Wis. 642 (97 N. W. 563).

III. Eight grounds of negligence are alleged: (1) Defective condition of the engine because of which steam valves leaked, thereby obscuring the view of members of the crew in observing signals and obstructions; (2) the omission of Bradley in directing the transfer of the coal car to instruct the crew what route should be taken; (3) the failure of Brisbin to take the main track and to observe that the engine and car were on the side track and the giving of the signal that the side track was clear; (4) the movement of the engine at a dangerous rate of speed at the time of the collision, the failure of the engineer to ascertain the location of the standing cars in time to avoid the accident, and failure of the engineer to notice the signal of Brisbin to slow up immediately before the collision; (5) running the engine and the coal car on the side track when obstructed, instead of the main track; (6) failure of Bradley and Brisbin to keep a lookout for the standing cars and properly signal the engineer to stop before the collision; (7) the omission of the engineer and fireman to stop before the collision; and (8) employees moving the engine from the main track out onto the side track before being instructed what tracks to take in transferring the coal car. These several grounds of negligence were submitted to the jury, and a verdict authorized in event any of them were proven in connection with a finding that deceased was free from contributory negligence. Appellant contends that several of the grounds stated were without support in the evidence, and in this is sustained by the record.

With reference to the second and eighth grounds: the evidence was undisputed that the yard master, in

directing that the coal car be moved to the transfer track, did not tell employees which track to take; but it was equally conclusive that this was no part of his duty, and that the route was for the determination of the crew. It was the duty of the yard master to direct where to take the cars, but that of the crew to determine the manner of executing the orders, so that the evidence did not warrant the submission to the jury of whether the yard master was negligent in omitting to instruct what route to take, nor Brisbin and the engineer in proceeding without such instructions.

Another ground of negligence alleged in different forms was that the crew were negligent in taking the side track. No argument is required to vindicate the

right of the employees to make use of such track as might be selected, at least unless an unsafe place to perform the work, and there is no claim but that the work might have been done on the side track in entire safety; but it was their duty to know where they were moving the engine and car, and the theory of the plaintiff is that, notwithstanding Brisbin's testimony to the contrary, they moved eastward through the switch on the side track in the mistaken supposition that they were on the main track. True they had backed the engine from the side track shortly before without stopping to close the switch, and might have observed which track they were taking, as the light at the switch stand was burning brightly. But scarcely had they passed this when Brisbin signaled the engineer that the track was clear the entire way to the transfer track; whereas, the cars had been left near the east end of the side track shortly before, and he knew that track was not clear.

Moreover, the engineer, as he could see the head end of the coal car, must have known that no one was there keeping a lookout, and, as the steam and smoke obstructed his view part of the time, he must have proceeded with



the belief that the track was clear, though he knew cars were on the side track. Again, it is not probable that they intended to take the cars back to the transfer track when they had been brought from there immediately before, and it is scarcely possible that they proposed to pull them back from the transfer track, after leaving the coal car on side track No. 3, where the engine would stand with a train back of it to the west, with loaded cars to the east of it. All the circumstances are consistent with the theory that Brisbin and the engineer had forgotten that the switch had been left open when the engine was backed on the main track, and that when it returned with the coal car they supposed they were proceeding to the transfer along the main line. In no other way can Brisbin's signal and the subsequent operation of the engine be reasonably explained. Whether they failed to observe that they were moving on the side track, and therein were negligent, was rightly submitted to the jury.

IV. Among other instructions given, the court told the jury that "it was the duty of the said Joseph J. Yeager to use ordinary and reasonable care in looking out for obstructions which might be in the way of the moving car and engine, and to use ordinary and reasonable care in placing himself in a position where he could signal the engineer in the event that he observed an obstruction, and no reliance upon the care and watchfulness of his coemployees would excuse him unless his reliance on the same, if he did so rely, in your judgment, based upon the evidence, would not be a want of ordinary care under the circumstances surrounding the same." Counsel assume that this required deceased to look out for obstructions and place himself where he could do so and signal to the engineer, but, though not happily worded, it exacts no more than the exercise of reasonable care therein. If he was where he should have

5. SAME:  
negligence:  
evidence.

6. SAME:  
contributory  
negligence:  
instruction.

been and doing what he should have done, in the exercise of such care, no more was required by this instruction; but it is said that this permitted him to escape responsibility through reliance on the performance of his duty by another. It can not be questioned that one employee may rely upon the discharge of duty by another. *Bucklew v. Railway*, 64 Iowa, 603, *Nichols v. Railway*, 69 Iowa, 154. An instruction must be construed with reference to the evidence. No one could pretend that there was anything to indicate that deceased relied on Brisbin's being on the coal car, and the most that could have been intended by this instruction was that deceased might have relied on Brisbin giving signals from the footboard to the engineer, as it was impossible to do so from the side where he was riding. When so construed—and the jury could not well understand it otherwise—defendant had no cause for complaint.

V. In another instruction the jury was told that it was the duty of deceased, as field switchman, "to use reasonable and ordinary care to place himself in such a position as to enable him to properly perform

7. SAME.

his said work, including looking out ahead for obstructions and signaling the engineer, and if he failed to use ordinary and reasonable care in this respect he was guilty of negligence." Appellant argues that as, in the situation deceased had placed himself, he could not look ahead because of the coal car, the jury should have found for the defendant; but, according to the instruction, all exacted of him was that he exercise ordinary care in putting himself in a suitable situation to perform his work, and, as there was evidence tending to show that his proper place was on the footboard, it can not be said that the jury acted without evidence in saying he was where he should have been in the exercise of the degree of care required.

VI. Complaint is made of the court's refusal to give

the following instruction: "You are the sole judges of the credibility of the witnesses, what it proves, and what it disproves. If there is a conflict in the testimony, it is your duty to reconcile it consistently with the truthfulness of all the witnesses if you can do so; but, if you are unable to do so, it is for you to determine whom you will believe and whom you will disbelieve." This is awkwardly worded and might well have been rejected as indicating that the matter of credibility alone may prove or disprove something; but, aside from this, it exacts too much as the duty of the jury. Of course, the testimony of a witness is not to be rejected arbitrarily; but it may be rejected when the witness has been impeached in any of the recognized methods or owing to the inherent improbability of his testimony and the manner and appearance of the witness while testifying, and when so rejected the jury is under no obligation to undertake to reconcile other testimony therewith in order to uphold the credibility of the impeached witness. Nevertheless, one of the commonest tests for ascertaining the truthfulness of testimony lies in the attempt to reconcile the several stories of the witnesses as consistent with each other; but the jury ought never to be required to succeed if this involves the construction of the evidence of credible witnesses contrary to what the jury believe to be the truth. The inquiry is not with respect to the truthfulness of the witnesses, but of their testimony as given, and this is to be reconciled only when practicable. The refusal of the instruction was not error, though to have given it might not have been prejudicial. See *Optical Co. v. Michelson*, 1 Neb. (Unof.) 137 (95 N. W. 463).

The judgment must be reversed because of the submission to the jury of the two grounds of negligence unsupported by the evidence. That this was reversible error has been held too often to require the citation of authority. Appellee suggests that, as defendant requested that some of

the other allegations of negligence be withdrawn from the jury, this, in effect, amounted to an acquiescence in the submission of these. As no allusion thereto was made, and the requests were confined strictly to other allegations, there is no ground on which to base a finding that such requests inferentially conceded the sufficiency of the evidence to support these. Moreover, appellant requested that all the grounds of negligence alleged be withdrawn from the jury, and that was broad enough to include any without evidence to support them.—*Reversed.*

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JAMES CAHILL, Appellant, v. ILLINOIS CENTRAL RAILROAD COMPANY, Appellee.

**Railroads: INJURY TO SECTION MAN: NEGLIGENCE CONNECTED WITH OPERATION OF RAILWAY: FELLOW SERVANT RULE.** A gang of section men engaged in repairing the track, a part performance of whose duty it is to lift their push car from the track to permit the passing of an approaching train, are engaged in a service "connected with the operation of the railway," within the meaning of Code, section 2071; and if in removing the push car one of the men negligently drops his corner of the car, thus injuring another member of the gang assisting in its removal, the fellow servant rule will not prevent recovery by the one injured.

**Negligence: PRESUMPTION.** No presumption of negligence arises from the mere fact that one is injured, but it may arise from the nature of the cause or manner of the injury.

**Same: NEGLIGENCE: EVIDENCE.** In this action for injury to a section foreman while the gang were lifting their push car from the track, it appeared that it was the custom for the foreman ordinarily to give a word of warning when ready to set the car down, but that one of the men let go his hold and dropped his corner of the car without warning so to do from anyone, and there was no evidence tending to show that his act was not negligent. *Held*, sufficient to present a question of negligence to the jury.

*Appeal from Buchanan District Court.*—HON. FRANKLIN C. PLATT, Judge.

TUESDAY, MARCH 15, 1910.

ACTION at law to recover damages for a personal injury. There was a directed verdict and judgment for defendant, and plaintiff appeals.—*Reversed.*

*Cook & Cook*, for appellant.

*Kelleher & O'Connor* and *T. J. Fitzpatrick*, for appellee.

WEAVER, J.—The plaintiff was a section foreman in the service of defendant at Winthrop, Iowa. In the work of repairing and mending the railway track he and his gang of three men were supplied with a push car on which tools or materials were transported or moved from place to place. It was their duty to be on the lookout for trains, and in proper time before the arrival of one to remove the push car from the track. On the day in question, plaintiff and his men were in the line of duty, moving their car with their tools and repair material along the track to the eastward, when they discovered the approach of a train and set about the work of clearing the track. The car was furnished with a convenient handle at each of its four corners, and the gang, following the usual method, each laid hold of a handle and, lifting the vehicle, carried it to the north side of the track. The snow at that point was about eighteen inches deep. It was the custom in thus removing the car to let it down at the word or call of the foreman or some other member of the gang when it had been carried to a safe distance from the track. On this occasion, when the car had cleared the north rail but a short distance, and while the plaintiff was carrying the northwest corner, some one of the other three men either purposely or accidentally let go his hold, causing plaintiff to fall in such manner that he was struck by the handle or frame of the

car, receiving injuries which disabled him for a year or more. Immediately as he fell, and while still under the car which had fallen on him, one of the men came to his assistance, saying: "I dropped the car and didn't mean to. Are you hurt?" This is the case as made by the plaintiff, and, as he was denied the right to go to the jury, we are required to give the testimony the construction most favorable to him.

The single question presented is whether, upon such construction of the record, we can say that a verdict for the plaintiff could be upheld. This depends in a degree upon

the nature of the service in which he was employed and of the negligence of which he complains. If the negligence (if any there was) can fairly be said to have been "connected with the use and operation of the

1. RAILROADS:  
injury to  
sectionman:  
negligence con-  
nected with  
operation of  
railway: fellow  
servant rule.

railroad on or about which he was employed," then he comes within the protection of Code, section 2071, and the fellow-servant rule will not prevent his recovery of damages. The "operation of a railway" includes something more than the transportation of freights and passengers, and the army of employees connected with its "use and operation" includes within its ranks more than those who are engaged in the moving of trains. A very appreciable proportion of the operation of a railway has to do with its maintenance and repair, and especially where such work involves the movement of engines or of cars of various kinds and uses. For instance, the statute has been held to include within its protection the shoveler unloading gravel from a gravel car (*McKnight v. Railroad Co.*, 43 Iowa, 406); the shoveler in the gravel bank loading a car (*Deppe v. Railroad Co.*, 36 Iowa, 52); one engaged in operating a derrick erected on a flat car (*Nelson v. Railroad Co.*, 73 Iowa, 576); clinker man (*Butler v. Railroad Co.*, 87 Iowa, 206); coal handlers while coaling a standing engine (*Akeson v. Railroad*, 106 Iowa, 54); track men distributing rails with the

aid of an engine and cable (*Williams v. Railroad Co.*, 121 Iowa, 270); section men in the use of a hand car (*Mikesell v. Railroad Co.*, 134 Iowa, 736; *Larson v. Railroad Co.*, 91 Iowa, 81); construction car moving over a temporary track (*Mace v. Boedker*, 127 Iowa, 721). In the *Larson* case this court cited with approval *Railroad Co. v. Artery*, 137 U. S. 507 (11 Sup. Ct. 129, 34 L. Ed. 747) in which it was held that the use of a hand car by section men was an employment connected with the operation of a railway within the meaning of our statute. See, also, *Smith v. Railroad Co.*, 99 Iowa, 617, and *Frandsen v. Railroad Co.*, 36 Iowa, 372.

It is generally held by all courts where statutes similar to our Code, section 2071, have been enacted, that the provision is intended for the benefit of those railway employees, no matter in what department of service, whose duty for the time being exposes them to the dangers and hazards peculiar to the operation of railways. And surely when a man, in pursuance of his employment, rides or pushes or manages a hand car along the rails to transport tools or material or men, his service is as certainly "connected with the operation of a railway" as is the man who handles the throttle upon an engine which pulls or pushes a car loaded with gravel or other road building material. So, also, the danger to which the section hand is exposed in moving his car along the track from the approach of trains having the right of way is danger peculiar to railroading, and as his duty requires him, under such circumstances, to remove his car from the rails until the train has passed, and then to replace it and proceed, such service never ceases to be connected with the operation of the railroad, and, so far as any danger attends such service, it must be classed with the hazards of railroad operation. If the railway company should provide side tracks and switches for the benefit of sectionmen and their hand cars, their work in taking to such side tracks for the passing of

trains would be so obviously connected with the operation of the railway that few would think of questioning it; and when the company obviates the necessity of side tracks and switches for such use by furnishing a car which the men can carry, and requires them to do their "switching" by lifting it bodily from the rails and replacing it when the danger has passed, we are very clear that in so doing they are still assisting in the operation of the road. This conclusion finds support in cases from other states as well as our own. *Hardt v. Railroad Co.*, 130 Wis. 512 (110 N. W. 427); *Steffenson v. Railroad Co.*, 45 Minn. 355 (47 N. W. 1068, 11 L. R. A. 271).

There is nothing in *Dunn v. Railroad Co.*, 130 Iowa, 580, inconsistent with the view here expressed. In that case no question of the use of a hand car arose. The only inquiry there was whether the injury caused by a passing engine striking an iron bar negligently left on the track and hurling it against a section hand standing on the right of way was of the class covered by Code, section 2071, and a majority of this court held that it was not. Until the majority recedes from that holding, it remains the law of this state for cases of that kind; but neither in fact or principle is the case at bar within the rule of that precedent. In this connection we may as well refer also to the case of *Andrews v. Railroad Co.*, 129 Iowa, 162, which is cited by appellee as having an important bearing on the questions presented by the present appeal. In that case plaintiff was injured by the falling or dropping of a hand car which he and others were carrying. No negligence was charged against the fellow workman who dropped the car, nor was the question raised whether in carrying the car they were engaged in the operation of a railroad within the meaning of our statute. The negligence alleged was the act or omission of the foreman in permitting the coming train to get too near before clearing the track, whereby the work had to be done in such a hurry that it



caused one of the men to stumble and lose his hold on the car. We held that there was no sufficient showing that the delay by the foreman was the proximate cause of the injury. The decision has little, if any, bearing upon the issue now under consideration.

We turn now to the question whether there was any evidence upon which the jury could find that there was negligence on the part of plaintiff's fellow workman in dropping the car without warning. Counsel for appellee say that no presumption of negligence arises from the mere happening of an accident. A better statement of the rule is that no presumption of negligence arises from the mere fact of injury to the plaintiff. Such presumption may and often does arise from the nature of the cause or manner of the injury. For instance, the mere fact that a trainman is injured while engaged in the line of his duty will not justify an inference of negligence on the part of his employer; but, if it appear that the injury was received in a collision between two trains of the same company moving in opposite directions on the same track, an inference of negligence does arise. The fact that a workman in a mine or quarry suffers injury from the explosion of a blast will not alone entitle him to recover damages from his master; but if it further appear that he was entitled to a warning and opportunity to escape before the blast was fired, and that no warning was given, a very different rule prevails. There may have been no negligence in either case. In the one, control of an engine may have been lost from causes against which reasonable care could not have provided, and, in the other, the blast may have been prematurely ignited without fault of any one; but the injured party suing for damages has never been held to negative all such possible explanations. As is said in *Railroad Co. v. Webb*, 12 Ohio St. 475: "In proving the injury, the plaintiff . . . may and often does prove such circumstances, under which the injury was

received, as raise a presumption of carelessness or negligence, and in such case the burden of disproving the presumption by explaining the circumstances so as to render their existence consistent with the absence of any negligence would devolve upon the defendant." This rule has been applied to cases where a railway switch has been found open, *Railroad Co. v. Johnson*, 23 Tex. Civ. App. 160 (55 S. W. 772); where a car escapes and runs wild, *Coal, Iron & Ry. Co. v. Hayes*, 97 Ala. 201 (12 South. 98); where a stone is being lifted over a workman and it falls upon him, *Smith v. Baker* (65 L. T. N. S. 467); where a girder falls from a building in the course of construction, *Wight v. Poczekai*, 130 Ill. 139 (22 N. E. 543); where a bucket used in hoisting coal is prematurely tripped, *Cummings v. Furnace Co.*, 60 Wis. 603 (18 N. W. 742, 20 N. W. 665); where a steel rail was thrown from a pile without warning to those below, *Railroad Co. v. Koehler*, 37 Kan. 463 (15 Pac. 567); where a piece of timber was being handled by fellow servants, one of whom turned the stick prematurely to the injury of another, *Railroad Co. v. Brassfield*, 51 Kan. 167 (32 Pac. 814); where section hands were carrying a heavy steel rail, and one of them suddenly let go his hold causing injury to his fellow workman, *Blomquist v. Railroad Co.*, 65 Minn. 69 (67 N. W. 804). Many others of similar nature might be cited.

In the case at bar the evidence tended to show that, in lifting the car from the track, it was the custom of the gang to give a word of warning when ready to set it down.

3. SAME: The plaintiff was foreman, and the one from whom the word would naturally be expected, negligence: evidence.

though under the evidence it might perhaps be given by any one of the gang. The foreman was at the northwest corner substantially in the direction the car was being carried. He was faced away from the car with the handle lifted about his hip and somewhat behind him. The man Penny was at the southwest corner, and it was

he as plaintiff testifies, who let go his hold or dropped the car; no word of warning having been given by any one. These facts are, in our opinion, sufficient to make the question of due care on the part of Penny one for the consideration of the jury. The fact that he dropped his corner of the car and did it without warning is shown. There is nothing, except his exclamation or statement to which we shall soon refer, to show that his act was not voluntary or due to his carelessness. Such being the case and no explanation or denial appearing, the jury could rightfully find, if indeed it was not bound to presume, that the act was a voluntary one, or one of pure heedlessness.

Does the statement made by Penny: "I dropped the car. I didn't mean to. Have I hurt you?"—introduce any element into the case which obviates the result above indicated? We think not. Independent of this statement, there is evidence that he is the one who dropped the car, and the effect of that proof is not neutralized by his declaration that he did not mean to do it. But even conceding the literal truth, it is not inconsistent with his alleged negligence. Counsel is not correct in the assumption that, if an act is inadvertent, it is therefore not negligent, for, generally speaking, the very essence of negligence is inadvertence. Only the malignant or vicious intend injury to others, and such intentional injury is willful, but not negligent in the proper sense of the word. Were there any evidence here that Penny lost his hold by reason of slipping or stumbling, or other cause consistent with due care on his part, the cases of *Bolsem v. Railroad Co.*, 140 Iowa, 73, and *Tibbets v. Railroad Co.*, 138 Iowa, 178, and and other precedents of that class cited by appellee would be pertinent; but the record discloses nothing except that Penny, whose duty it was to hold up his corner until the word was given, dropped it. Presumptively such act was voluntary, and, being a violation of the duty which he owed to others engaged in lifting the car, it was negligent. His

statement after the injury that he "did not mean to" may have been and probably was, competent evidence as a part of the *res gestae*; but it would be going entirely too far to say it was conclusive of the question of his due care.

For the reasons stated, it was error to direct a verdict, and the judgment appealed from is therefore *reversed*.

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HATTIE A. POITEVIN, Appellee, v. FRANK BINNALL, ET AL.,  
Appellants.

**Reference of causes:** FILING OF PLEADINGS BEFORE REFEREE. A referee

1 to whom a cause has been referred for trial by the court has the same power under the statutes to permit the filing of original as well as amended pleadings, even though the effect of the pleading is to present new issues which were not before the court at the time of the submission.

**Same:** DISCRETION. Where a reply was filed before a referee after

2 the proper time, upon grounds which were contested but found sufficient, the discretion exercised in permitting the filing of the same can not be disturbed on appeal.

**Same:** RESUBMISSION OF CAUSE. The court has power to order a

3 reference for trial of an action to quiet title, either with or without consent of the parties, and to set the reference aside and re-submit the case.

*Appeal from Crawford District Court.*—HON. Z. A.  
CHURCH, Judge.

TUESDAY, APRIL 5, 1910.

THIS is an action brought by the plaintiff to quiet title to certain real estate. The defendant filed an answer and crossbill setting up title in himself. There was a decree for the plaintiff, and defendant Frank Binnall appeals.—*Affirmed*.

B. I. Salinger, for appellant.

*Conner & Lally*, for appellee.

EVANS, J.—Plaintiff and defendant are sister and brother. The premises in controversy were duly conveyed to the plaintiff by warranty deed executed by her father. The defendant set up an alleged previous contract between him and his father purporting to have been executed April 24, 1882, whereby the father agreed to convey the land in question “in and for the consideration of labor,” and “if the party of the second part shall remain at home and upon said property so long as the party of the first part shall live.” This claim on the part of the defendant was first set up on March 29, 1905, in a substituted answer and cross-petition filed on such date, his original answer having been filed in November preceding. On the same day an order of reference was made by consent of parties to one Wheeler as referee. At that time no reply had been filed to the substituted answer and cross-petition. The case came on for hearing before the referee on April 25th. On that day the plaintiff filed a reply to the substituted answer and cross-petition, and observed the formality of having it properly marked and entered as filed by the clerk of the court and by the referee. The defendant moved to strike it, and objected to its consideration by the referee, and insisted that the case be heard upon the issues as made by the pleadings prior to such filing. He contended that such pleading was not an “amendment,” and that therefore the referee had no power to permit the same to be filed, nor any right to regard the same as filed. Defendant’s objections in this regard were all overruled, and the referee proceeded with the hearing of evidence. After the evidence was heard, the plaintiff undertook to fortify her position by obtaining an order of the judge in vacation, which order was first issued and afterwards revoked, and which we do not deem material for our present consideration. At the September term, while the reference was still pending, the

trial court went through the formality of ordering the reference set aside and granting permission to the plaintiff to file her reply, and entered a *nunc pro tunc* order that it should be filed as of March 29, 1905. Under direction of the court, the clerk marked such pleading as having been filed on such date, and noted proper entries to that effect; all of which was done over the objection of the defendant. The court thereupon resubmitted the case to the referee, directing that the same be reopened and that the referee receive such additional evidence as the defendant might desire to offer, and fixed October 7th following, as a date for further hearing of the case. The referee requalified, and some further proceedings were had before the referee which are not material for our present consideration. On October 24th, the referee filed his report. Exceptions were duly filed by the defendant, all of which were later overruled by the court, and the findings of the referee were approved and a decree was entered for the plaintiff granting her the relief prayed. The defendant challenges here the procedure which was adopted before the referee and in the court below, all of which was duly objected to by him at every stage thereof.

We direct our first inquiry, therefore, to the question whether the plaintiff's reply was properly filed on April 25, 1905, and whether the referee had power to permit it and to consider the issues made by it. Section 3738 of the Code provides that "the referee shall stand in the place of the court and shall have the same power so far as necessary to discharge his duty."

1. REFERENCE  
OF CAUSES:  
filing of plead-  
ings before  
referee.

Section 3739 provides that the trial by the referee shall be conducted in "the same manner as the trial by the court." This section also provides that the referee shall have the "same power . . . to allow amendments to pleadings." Section 3748 provides that the "form of procedure which in the court itself regulates service, pleading,

proof, trial and the preparation, progress and method of each of these, shall obtain before the referee." It is manifest that the emphasis of the sections is that for the time being, so far as the particular case is concerned, the referee shall stand in the place of the court and shall have the same power so far as necessary to discharge his duty. This is the express language of section 3738. It is urged by the defendant, however, that the power conferred by section 3739 is the power to allow amendments to pleadings, and not to allow the filing of an original pleading. We do not deem the point well taken. Section 3739 must be construed together with section 3738. We do not think that section 3739 was intended to abridge section 3738 in any respect. It will not be questioned but that a trial court would have had power to permit the filing of plaintiff's reply at such stage in the trial. We think that the referee had the "same power" by express provision of these sections.

It is argued that this new pleading presented new issues which had not been submitted to the referee by the order of reference, and that he was therefore without power to try them. This objection of defendant could as well be directed against an amendment to a pleading which may and usually does present new issues. New issues pending trial are not forbidden by the statute, although orderly procedure requires that, as far as possible, issues be made before reference is had. The discretion of the trial court, however, is always broad enough to deal with the particular facts of each case. And we are not now dealing with the question whether the discretion was properly exercised. We are united in the opinion that the referee had power under the statute to permit the filing of plaintiff's reply on April 25th. In *Johnson v. Berdo*, 131 Iowa, 524, it was held that in order to file a pleading before the referee it was necessary that the formal statutory entries should be made by the clerk. This formality was complied with here.

The same was also presented to the referee and its filing noted by him. Whether a formal filing by the referee in addition to the filing of the clerk was necessary, we do not need to determine. Such formality was in fact complied with.

We are also agreed that there was no abuse of discretion shown on the part of the referee or of the court proper in permitting the filing of such reply. A showing

2. SAME:  
discretion.

of excuse for the delay was made by the plaintiff by affidavit of her counsel. The matters stated in such affidavit were denied by counter affidavits. As to the comparative weight of the showing and counter showing, we will not review the action of the district court. Our conclusions at this point settle the right of the plaintiff to have the issues made by her reply duly considered as proper issues in the case. We can have no occasion, therefore, to consider the propriety of the various orders and counter orders made by the trial court with a view to comply with all necessary formalities to protect the plaintiff in such right. However erroneous such orders may have been, they were clearly nonprejudicial.

The court never having lost its jurisdiction of the case, it had power to order the reference either with or without the consent of the parties, and it had power to set the reference aside and to resubmit again. In

3. SAME:  
resubmission  
of cause.

the final resubmission, the rights of the defendant were fully protected by opening up the case to further evidence on his part. The net result of the procedure, however irregular, was a hearing of the case upon its merits.

This question being disposed of, it leaves little for our consideration but questions of fact. The case was orally argued before the full bench, and we have gone through the printed record with care, and are united in the conclusion that the clear weight of the evidence is with the plaintiff on every essential fact in dispute. Inasmuch



as this conclusion is in harmony with the finding of the trial court, it will serve no useful purpose that we enter into a detailed discussion of such testimony.

The decree of the trial court was right and it is *affirmed*.

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STATE OF IOWA, Appellee, v. CHARLES CRISWELL,  
Appellant.

**Criminal law: RECEPTION OF VERDICT: ABSENCE OF COUNSEL.** There

1 is no statutory requirement that counsel for defendant in a criminal case shall be present in court at the time the verdict is returned; but the court may receive the verdict and discharge the jury in the absence of counsel, and no legal right of the defendant is thereby invaded.

**Same: ARGUMENT OF COUNSEL.** Where a witness for a defendant ac-

2 cused of seduction testified that she had been the wife of three successive husbands, one of whom she married twice and from whom she was twice divorced, and another of whom she married while still the lawful wife of a previous husband, there was no impropriety in counsel commenting, within proper limits, on the marital relations and character of the witness.

**Same: IMPEACHING EVIDENCE.** Where it appeared from the evidence

3 of a witness for the accused that he was a neighbor of prosecutrix and her mother and that he had seen strangers frequenting their home prior to the alleged seduction, it was proper to show on cross-examination, as tending to impeach him, that he had signed a writing in which he stated that he knew nothing immoral of either, that they were of good moral character and conducted themselves properly.

**Seduction: INSTRUCTIONS: EVIDENCE.** The fact that prosecutrix tes-

4 tified on cross-examination that her seduction was accomplished solely by a promise of marriage did not preclude the jury from considering her testimony as a whole on that subject, which disclosed protests of love and other acts not inconsistent with a marriage engagement; and instructions permitting the jury to consider other acts than that of a false promise of marriage were justified.

*Appeal from Mills District Court.*—HON. O. D. WHEELER, Judge.

FRIDAY, JULY 8, 1910.

PROSECUTION for the claim of seduction. There was a verdict and judgment of guilty. Defendant appeals. *Affirmed.*

*Emmet Tinley, D. E. Whitefield, L. T. Genung, and W. E. Mitchell, for appellant.*

*H. W. Byers, Attorney General, Chas. W. Lyon, Assistant Attorney General, E. Starbuck, and W. S. Lewis, for the State.*

EVANS, J.—The crime charged against the defendant was alleged to have been committed about May 20, 1907. The indictment was returned on April 16, 1908. The prosecutrix is one Sarah Norris, who claims that at the time of the alleged offense she and the defendant were engaged to be married. A child was born to her in February, 1908.

I. The jury reported an agreement and returned into court shortly after the opening of the afternoon session of October 8, 1908. The defendant was immediately notified to appear, and he did appear and was present in person when the verdict was received and read. His counsel, however, were not present. After the verdict was read in the hearing of the jury, the trial judge put to them the following question: "Gentlemen, so say you all?" To which all the jurors responded affirmatively. The jury was thereupon discharged. Within a few minutes thereafter, attorneys for defendant appeared in the courtroom and expressed a desire for a poll of the jury. This could not be had because of the discharge. The defendant complains because of the action of the trial court in failing to notify

1. CRIMINAL LAW:  
reception  
of verdict:  
absence of  
counsel.

defendant's attorneys and in failing to have them present at the time of the receiving of the verdict. The principal argument of appellant is directed to this question. The argument purports to be based very largely upon the provisions of section 5313 of the Code, which provides that "if the defendant appears for arraignment without counsel, he must, before proceeding therewith, be informed by the court of his right thereto and be asked if he desires counsel, and if he does and is unable to employ any, the court must allow him to select or assign his counsel." The section referred to appears to have no reference whatever to the case under consideration. So far as this record discloses, the defendant had the assistance of four or five attorneys, and had such assistance from the beginning of the prosecution until the end. Having such counsel, no further duty devolved upon the court to instruct him as to his right to counsel. The complaint of the argument is that one of defendant's attorneys was at his office near at hand, and that the other was in the auditor's office in the courthouse, and that the court should have found them and notified them of the return of the verdict before receiving the same. The argument in this respect is without merit. The court was under no duty to ascertain the whereabouts of counsel nor to see that they were at their client's side. As a matter of usual practice, trial judges are considerate and painstaking in the matter of calling counsel under such circumstances. We have no doubt the trial judge would have observed such practice in this case if any request had been made to that effect. If the attorneys did expect anything of that kind, the most ordinary consideration on their own part would have required them to make such request, and to give information to the court as to where they might be found. Indeed, such request and information could have been readily left with the sheriff or with the bailiff. But no request was made of

nor information given to the court or any of its officers. The defendant himself was not in custody but was under bail. He made no effort himself to obtain the presence of his counsel nor did he make any request, or suggestion that they be sent for. No legal right of the defendant was invaded by the receiving of the verdict in the absence of counsel. If the failure to call them had been a discourtesy, it could not furnish a ground of reversal here, but this record does not disclose even a discourtesy, and we think the argument is without merit on this ground.

II. One Mrs. Rammey was a witness on behalf of the defendant. She testified that she had been the wife of three successive husbands, one of whom she married twice and was twice divorced from him, and

2. SAME:  
argument of  
counsel.

another of whom she married while she was still the lawful wife of a previous hus-

band. The county attorney commented upon her marital connections and upon her character. The abstracts are in dispute as to just what he said. Whatever it was, it was very indefinite as presented in this record, nor can we say that the attorney exceeded the proper limits of argument under the testimony. The only objection made to the statement at the time was a contradiction thereof by defendant's counsel. No request with reference thereto was made to the court, nor was the subject referred to in any manner later. We are satisfied that the incident furnished no fair ground of complaint.

III. One Dunn was called as a witness for the defendant, who gave testimony tending to show previous unchaste character on the part of the prosecuting witness and her mother. It appeared from the testimony

2. SAME:  
impeaching  
evidence

of this witness that he lived as a near neighbor of the prosecutrix and her mother, and that he had observed strange men frequenting the home of the prosecutrix for some years prior to the alleged

seduction. Upon cross-examination it appeared that the witness had, about a month previous to the time of the trial, signed a paper which was a somewhat fulsome certificate of character of the prosecutrix and her mother. He certified therein that he knew nothing morally bad of either of them, and that they were of good moral character and had always conducted themselves "properly as ladies," etc. The witness was confronted with this paper and he admitted that he signed it and it was put in evidence as a part of his cross-examination. It is argued here that this paper did not tend to impeach the testimony of the witness and that it was therefore inadmissible. It is also said that the paper contained other signatures than that of the witness. We think the written statement was wholly inconsistent with the testimony of the witness. He offered no explanation of the inconsistency, and the state was entitled to the evidence for what it was worth. If there were other signatures, such fact does not appear from the instrument as it is incorporated in defendant's abstract.

IV. Complaint is made of the instructions of the court because they permitted the jury to find that the alleged seduction was accomplished not only by false promise of marriage, but by "other false and insinuating artifices and deception." Counsel have not taken the pains to point out to us the particular instruction in which the language complained of occurs. We are unable to find this particular language in any instruction. It is argued however, that plaintiff testified that the sole cause of her yielding was the false promise of marriage, and that the consideration of the jury should have been confined to that alone. The instructions of the court did permit the jury to consider other arts than a false promise of marriage in determining the guilt of the defendant. The instructions in this respect were clearly justified by the evidence. The fact that the

4. SEDUCTION:  
instructions.  
evidence.

prosecutrix testified on cross-examination that the promise of marriage was the sole cause of her fall would not preclude the jury from giving consideration to her testimony as a whole, which discloses protests of love and other acts not inconsistent with a marriage engagement.

No other alleged errors are assigned. We find no ground for reversal.

The judgment of the trial court must therefore be *affirmed*.

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EDWARD LINDQUIST, Appellant. v. AUGUSTA M. LINDQUIST,  
Appellee.

**Divorce: CUSTODY OF CHILDREN: MODIFICATION OF DECREE.** The court has power to modify a former decree of divorce with respect to the custody of minor children where there has been such a change in the circumstances and conditions of the parties as will authorize the same; and in this matter the trial court is vested with a wide discretion. In the instant case the changed circumstances and conditions of the parties are held to justify a modification of the former decree with respect to the custody of the child.

*Appeal from Pottawattamie District Court.*—HON. W. R. GREEN, Judge.

SATURDAY, JULY 9, 1910.

IN December of the year 1908, plaintiff obtained a divorce from defendant in the district court of Pottawattamie county; and in the decree was given the custody of three minor children. On the 18th day of October, 1909, defendant filed a petition for a modification of the original decree in which she asked that the said decree be canceled for fraud in its procurement; that she be granted a decree of divorce from plaintiff; and that in any event she be given the custody of the minor children, particularly the control of the daughter, Minnie.

A hearing was had on this petition, resulting in a denial of the relief asked, except that defendant was given the custody of the daughter, and the original decree was modified to that extent. Plaintiff alone appeals.—*Affirmed.*

*McKenzie, Howell & Cox* and *W. W. Bulman*, for appellant.

*Jennings & Mattox*, for appellee.

DEEMER, C. J.—As defendant does not appeal from the ruling made on her petition for modification of the original decree of divorce, we have nothing to consider on plaintiff's appeal save the order awarding to defendant the custody of the minor child, Minnie. The parties to this litigation were married in February, 1896, and although the paternity of some of the children is doubted it must be assumed, for the purposes of this case, that as a result of the marriage three children were born, to wit, Elmer, Arvid and Minnie. At the time of the hearing on the petition for the modification of the decree Elmer was twelve years old, Arvid ten and Minnie eight. The original action was commenced in September of the year 1908, and went to a decree on the issues joined December 21st of the same year. This decree, so far as material, reads as follows:

It is therefore ordered, adjudged and decreed by the court that the marriage relation heretofore existing between the parties be and the same is hereby set aside and wholly annulled, and the parties released from the obligations of the same; that the care, custody, maintenance and education of said children, Elmer, Arvid and Minnie be, until further order of the court, confided in the plaintiff, Edward Lindquist, and in event the custody thereof should in the future be given to the defendant, the plaintiff shall at all times be liable for their support; that the defendant have the right to call upon and converse with any or all of said children at all reasonable times.

No appeal was taken from this decree, but upon October 18, 1909, defendant filed a petition for the modification thereof as before stated. The modified decree, so far as material which was entered upon the petition, reads:

The court finds that the modification asked for by the defendant should be granted as to the daughter, Minnie Lindquist, and that the custody of the said Minnie Lindquist should be given to the defendant and the plaintiff being present with his attorney, as stated, stated to the court that if the order was made for any one of the children to be given to the defendant, he desired that they should not be separated, and that the order should be made, giving the custody of all of the children to the defendant, subject to his exceptions to the order or any part thereof, and not waiving his rights. It is therefore ordered that the decree entered in this cause on December 7, 1908, in so far as the same gave the custody of the children named in the pleadings to the plaintiff, is amended and changed and the custody of the children is hereby given to the defendant. . . . It is further ordered that each party pay his or her own costs in this proceeding, and it is further ordered that the plaintiff pay to the defendant, the sum of \$15 per month, each month, in advance, at the clerk's office in Council Bluffs, Iowa, for the support of said children, for a period of two years, until further ordered herein, and a bond for appeal is fixed in the sum of \$500, and the plaintiff given until November 8th to file said bond.

For a reversal of this modified decree it is contended by counsel for plaintiff that neither the pleadings nor the proof show any such change in the circumstances or situation of the parties, after the original decree was entered, as would justify a modification of the decree as to the custody of any of the children. They further contend that under the testimony produced on the hearing of the petition for modification of the decree, the trial court should not have changed the custody of the children; that their welfare demanded that they be left in the custody of their



father, the plaintiff in the original suit. Plaintiff did not demur to the original petition for modification of the original decree nor did he at any time in the court below challenge its sufficiency, and without quoting therefrom it is sufficient, as we think, to justify the order of modification made by the trial court, provided it is sufficiently supported by the testimony. Section 3180 of the Code provides: "When a divorce is decreed, the court may make such order in relation to the children, property, parties and the maintenance of the parties as shall be right. Subsequent changes may be made by it in these respects, when circumstances render them expedient."

Without a statute it is generally held that a court of chancery may expressly reserve control of the case, and keep it open for further relief or proceedings before it passes to final decree. Some cases go even farther than this and hold that a court of equity may, at a subsequent term, upon a supplemental bill, modify or change a final decree. These decisions are generally bottomed upon statutes and need not be approved at this time. It is the universal holding, as we understand it, that a chancellor may reserve questions for future decision or for directions by future judgment or decree. *Ex parte Ambrose*, 72 Cal. 398 (14 Pac. 33); *Coolege v. Coolege*, 1 Bart. Ch. 77. No decree can be considered as final which leaves anything open to be decided by the court, and which does not determine the whole case. There is much ground for saying that the judge trying the original case, who was the same judge that heard the petition for the modification of the decree held jurisdiction of the case for the purpose of finally determining the custody of the children, and that the provision with reference thereto in the original decree was interlocutory, and not final in character. But however this may be, the statute quoted gives the court express power to modify the original decree as to the custody of the children at a subsequent term of court. Generally

speaking, such modification can only be had where there has been a change in the circumstances or conditions of the parties since the rendition of the original decree. *Graves v. Graves*, 132 Iowa, 199; *Crockett v. Crockett*, 132 Iowa, 388; *Blythe v. Blythe*, 25 Iowa, 266, and cases cited.

Courts should carefully consider the welfare of the the children, and upon such applications as were here presented the trial court is vested with a wide discretion, due to the fact that the future of a human life is likely to be involved. *Slattery v. Slattery*, 139 Iowa, 419. Assuming for the purposes of decision that the trial court was not justified in modifying the original decree as to the custody of the children, except upon a showing of a change in the circumstances or conditions of the parties, we are constrained to hold that such a showing was made, and that the trial court did not abuse its discretion in making the modified order. The testimony on the original trial which is now before us shows a most shocking situation, and an almost entire disregard upon the part of each of these litigants of their marital duties, relations and obligations. Each had been guilty of adultery before the original decree was passed and the trial court might have denied either relief on the original hearing. Each had a bad character and neither seemed to be fit to have the custody and the rearing of minor children. It was for this reason, no doubt, that the trial court entered the character of decree that is found in the record with reference to the custody of the children. The trial court was justified in finding from the testimony on the petition for modification of the decree that while the plaintiff had not reformed, defendant had done so, and as the time of the second hearing was leading a virtuous and exemplary life. Again, it was shown on the second hearing that defendant was financially able to care for her children, or for the daughter, which fact did not appear on the original

trial. Again, after the decree was entered in the original case, plaintiff took the children to the state of Nebraska and left them with defendant's half-sister, who made it so unpleasant for defendant when she attempted to visit her offspring that she was practically compelled to desist from gratifying her maternal instincts. These facts, as we have said, justified the trial court, who had all the parties before him and was able to judge of their fitness and the welfare of the children from personal observation, in making the modification of the order for the custody of the daughter. The other part of the decree was entered by appellant's consent and he may not complain of that.

We are not justified from the record in disturbing the modified order, and it is therefore *affirmed*.

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ETTA REYNOLDS v. CHARLES F. SMITH and LEWIS  
SCHOOLER, Appellants.

**Physicians: MALPRACTICE: NEGLIGENCE: EVIDENCE.** In this action  
1 for damages against a physician for his negligence for failing to remove a piece of gauze from the plaintiff's wound after an operation, the physician's evidence was that his method of keeping track of the gauze used in an operation required the nurses to count the pieces used, but it did not appear that that method was followed in plaintiff's case, or that any precaution was taken save tying a knot in one of the pieces of gauze used. *Held*, that evidence of the method adopted by the hospital, in which the operation was performed, for keeping track of gauze used was inadmissible.

**Same: IMPEACHING EVIDENCE.** It appeared in this action that de-  
2 fendant testified on a former trial the same as on this trial of the action that plaintiff was afflicted with a certain disease, and plaintiff on this trial testified that so far as she knew she had never had the disease or any symptoms thereof. *Held*, error to sustain an objection to an inquiry of plaintiff as to whether she gave any testimony on a former trial regarding the matter, as her failure to so testify on the former trial would justify an inference that she acquiesced in the statements of the defendant, and tend to impeach her evidence.

**Same.** There was also evidence that defendant had operated upon 3 the plaintiff previously, and he testified that in disclosing the cause of her trouble at that time he had not said that plaintiff had a specific infliction, and that he had not said at any time that she had a particular disease. *Held*, that error in refusing to permit plaintiff to state whether at the time of the prior operation the defendant had told her she had a particular disease was not prejudicial.

**Malpractice: CUSTOM AND USAGE: INSTRUCTION.** Where there was 4 no evidence of the custom or usage of physicians in performing an operation, refusal of an instruction that all required of physicians was that they follow the custom and usage in the performance of operations in the vicinity where they practiced, was proper. And if there had been such evidence refusal to give such an instruction in this case was especially proper, as the evidence showed a failure of the wound to heal and the continuance of suppuration, which, together with the significance of leaving gauze in the wound required a submission of the question of negligence to the jury.

**Same: NEGLIGENCE.** A physician operating upon a patient at a hos- 5 pital is not responsible for the acts of nurses and internes in dressing the wound where they were not his employees, unless he was negligent in permitting them to do so.

**Expert evidence: INSTRUCTION.** Where no hypothetical questions are 6 put to experts an instruction that the jury must find the facts on which the expert opinions are founded is not necessary.

**Same.** An instruction that the jury must give to expert evidence only 7 such credit as they deem it justly entitled to and must give it such weight as other evidence, taking into consideration the knowledge possessed by the witnesses testifying as experts, the matters testified to by them and the other evidence in the case, does not disparage expert testimony but cautions the jury against blindly accepting what the experts say, and is proper.

**Malpractice: CONTRIBUTORY NEGLIGENCE: INSTRUCTION.** Where the 8 court instructed the jury to consider what plaintiff did or in the exercise of ordinary care should have done, the charge with reference to contributory negligence was not objectionable in that it failed to direct the attention of the jury to the question of whether plaintiff failed to disclose her suffering or symptoms to defendant, which might have suggested the cause thereof.

**Same: NEGLIGENCE: EVIDENCE.** In this action for malpractice in 9 failing to remove gauze from the wound of plaintiff after an oper-

ation, the evidence is held to require submission of the issue of defendant's negligence to the jury.

**Same: EXCESSIVE VERDICT.** In view of the serious doubt under the evidence as to whether defendant's negligence in operating upon the plaintiff caused the necessity for another operation, and of plaintiff's condition prior to the operation by defendant, the verdict of \$2,000 damages is reduced to \$1,200.

*Appeal from Polk District Court.*—HON. JAMES A. HOWE, Judge.

SATURDAY, JULY 9, 1910.

ACTION for damages. The defendants appeal. *Affirmed* on condition.

*Dudley & Coffin and Spurrier & Parsons*, for appellants.

*Hunn & Jones*, for appellee.

LADD, J.—An abdominal operation for the removal of a cyst or tumor was performed by Dr. Schooler on plaintiff January 16, 1905. Dr. Smith was then Schooler's partner and attended the patient until the 19th, when Schooler, who had been temporarily absent, resumed charge and attended the patient until her return to Blue Earth, Minn., Feb. 23, 1905. The wound had not entirely healed, and, upon her arrival there, Dr. Schmidt dressed it. On the 27th he made an examination, and, according to his testimony, found a piece of surgeon's gauze about sixteen inches square in the abdominal cavity, and, after enlarging the opening, removed it. Though the wound then healed, plaintiff continued to be weak and suffered from melancholia for some time, and in April, 1906, was operated on by Dr. Schmitt for hernia. Recovery for damages is sought for that, as is alleged, defendants were negligent in

failing to discover and remove the gauze, subsequently extracted by Dr. Schmitt.

I. The interne was asked to explain the practice which obtained at the hospital in determining whether all gauze pads used in operations are accounted for. An

objection to the inquiry was sustained. The ruling was correct, for there was no evidence that any precaution had been taken in operating on plaintiff save by tying a knot in the second piece of gauze inserted. True, Dr. Schooler testified that "we have a way or method by which to keep track of the various pieces put in there. . . . The nurses count the pieces of gauze pads that are used." But the record does not indicate whether such way or method was followed in performing the operation on plaintiff. Had there been evidence of how track of the gauze was actually kept, doubtless, as bearing on the issue of negligence, testimony that this was in accord with custom would have been competent. In the absence of such evidence, the rule is otherwise.

II. In rebuttal of the statement of Schooler that he had previously performed two operations and that she had a gonorrheal affection, the plaintiff testified that in so far as she knew she never had had any disease of that kind or any symptom thereof. On cross-examination, she was asked whether she was examined on that subject at all on the second trial.

An objection as not proper cross-examination was sustained. Q. "You gave no testimony at that second trial that you did not have gonorrheal affection even after Dr. Schooler testified that you did?" This was objected to as incompetent, irrelevant and immaterial, and not proper cross-examination. The objection was sustained, the court adding, "as not proper in this case at this time. We are trying this case now and not what was done at some other time and no testimony of this character will be admitted."

1. PHYSICIANS:  
malpractice:  
negligence:  
evidence.

2. SAME:  
impeaching  
evidence.

The last ruling was erroneous. If Dr. Schooler testified at the former trials as suggested, she had the opportunity to have contradicted him, and if she did not do so, but remained silent, it might have been inferred therefrom that she acquiesced in what he had said as true. See *State v. Dexter*, 115 Iowa, 678. Her answer to the inquiry, then, had it been favorable to defendant, would have tended to impeach her testimony that to her knowledge she had not been afflicted with the disease.

Any possible error in rulings by which she was not allowed to say whether about the times of prior operations, Dr. Schooler told her she had gonorrheal affection was

3. SAME.           obviated by her testimony that in discussing the cause of her disease or trouble at the time of her first operation, he had not said there was specific infection and her statement in response to an inquiry by the court that the doctor had not said at any time that she had gonorrhea. Even though answers to some of the interrogatories might well have been allowed their exclusion could hardly have been prejudicial, for whether she knew that she had been afflicted with the disease could have had little or no bearing on the question as to whether defendants were negligent, and this is true also of the ruling previously mentioned. The evidence was sought to be adduced in cross-examination in rebuttal, and as it properly could have been considered for impeaching purposes only, and even then solely with relation to her knowledge, we regard the rulings as not prejudicial.

III. Defendants requested several instructions to the effect that all exacted of them was that they follow the customs and usages of physicians in the performing of such operations in the vicinity where they practiced. These were rightly refused, for no evidence was adduced that any particular custom or usage in the matter of avoiding leaving the gauze in plaintiff was actually followed. Moreover, if there had

4. MALPRACTICE:  
custom and  
usage:  
instruction.

been such evidence, these instructions ought not to have been given, for, in view of the failure of the wound to heal, the continuance of suppuration, together with the significance of leaving such a substance in the body, the issue of negligence must have been submitted to the jury.

IV. The evidence disclosed that nurses and the interne sometimes dressed the wound. They were not employees or agents of the defendants, and unless defendants were negligent in permitting this to be done by them, they were not responsible for their acts save in so far as their duty exacted examination of the wound and proper treatment. Had there been evidence tending to show that from the acts or omissions of said nurses and interne a gauze became lost and was allowed to remain in plaintiff's abdomen, the jury must have been instructed as above, but in the absence of such evidence, and especially in view of the explicit instructions as to the necessity of an affirmative finding of negligence on the part of defendants there was no error in refusing to give the sixteenth instruction requested.

V. That portion of the eighth instruction following is criticised:

Though it is with a view of aiding you in determining the questions submitted to you that expert testimony has been admitted, you should bear in mind that the opinions of experts may be correct or incorrect, and that such testimony, depending on whether it tends to reveal the truth or otherwise, may or may not aid you in arriving at a correct conclusion, and that upon you rests the responsibility of a true verdict. The expert testimony should be weighed and considered by you as you weigh and consider the other testimony, and taking into consideration the amount of skill and knowledge possessed by the witnesses giving expert testimony, the matters testified to by them, the other evidence and facts and circumstances of the case, you should give to the expert testimony such weight

5. SAME:  
negligence.

6. EXPERT  
EVIDENCE:  
instruction.



and credit, and only such weight and credit, as you deem it justly entitled to receive. It is your duty to give to the evidence, and all of the evidence in this case, full and fair consideration, and draw therefrom the conclusion which your judgment and consciences approve as just and right. When expert witnesses testify to matters of fact, from personal knowledge, their testimony, as to facts within their personal knowledge, should be considered the same as that of any other witnesses who testify from personal knowledge.

As we understand counsel, the criticism is that the jury was not told the facts upon which expert opinion is founded must be fully proven. But no hypothetical questions were put.

Nor do we think the instruction, when fairly construed, disparaged expert testimony or indicated that it might be rejected because such was its import. Like other testimony

it must reveal the truth in order to be of aid

7. SAME.

to the jury. That it may or may not be

correct is also true. The manifest design of the instruction was to caution the jury against blindly accepting what experts on either side had said, as is often likely to be done, owing to the expert's knowledge and the jury's ignorance of the subject of inquiry, and to emphasize their duty to apply the same rules in weighing and testing expert as is applied to other testimony. The instruction is not open to fair criticism.

VI. Exceptions to the fourth and seventh instructions are unfounded. The former states the standard by which the skill of physicians is to be tested according to the prior decisions of this court. *Whitesell v. Hill*,

8. MALPRACTICE:  
contributory  
negligence:  
instruction.

101 Iowa, 629. The latter was on the subject of contributory negligence, and the criticism is that attention was not directed to whether plaintiff omitted to disclose her sufferings, or symptoms which might have suggested the cause thereof. This, however, was included in the suggestion that the jury consider "what

she did or in the exercise of ordinary care should have done."

VII. Counsel for appellants contend that the record as a whole does not show that defendants failed to exercise the degree of skill and care exacted in such cases. That both are eminent in their profession alone  
9. SAME: negligence: evidence. can not exonerate them from the charge of negligence. The most proficient are subject to the infirmities of human nature, and as the books demonstrate, sometimes may lapse below the standard by which their conduct is to be measured. The history of the patient was such as permitted of no relaxation in attention at and after the operation. At an operation in 1900, Dr. Schooler had removed her ovaries and fallopian tubes, and at another operation in 1901, had removed her womb. If she was afflicted with a gonorrheal affection, this may have exacted greater caution, or might have been thought to account for the delay in healing after the operation was performed. As said, this last operation was for the removal of a cyst, about as large as the fist, and at the lower left-hand corner of the abdominal cavity. An opening was made in front of the abdomen over the bladder. The intestines were packed back with gauze and the left hand inserted to the tumor. It was adherent to the intestines and about half of it attached to the abdominal wall. The tumor was broken in attempting to remove it, and blood clots, purulent matter, and serum ran therefrom into the hand, and was absorbed by the gauze pad. After its removal, the cavity from which it was taken was packed with gauze, and then the gauze first inserted removed. Small pieces of gauze were used in mopping the blood away so that the tissues could be seen, but they were thrown into a receptacle when released from the hand.

Dr. Schooler testified that two gauze pads were left in the patient, and Dr. Smith, that he removed these pieces three days later. It was the habit of Dr. Schooler to knot

the second piece of gauze inserted and Smith found one of those removed in that condition. He then inserted another piece of gauze several yards long to prevent bleeding and to act as a drain, leaving the end protruding through the wound. Upon Schooler's return on the second day thereafter he resumed charge and inserted a drainage tube and was of opinion that had there been gauze in the body he would have discovered it. Before the patient left for home, he testified to having again examined her without discovering anything abnormal save the continued suppuration. On the other hand Mrs. Reynolds related that Dr. Smith removed some of the gauze on Thursday after the operation had been performed on the Monday previous, cutting it off with scissors and some more in the same way on the following day, and that she did not remember of any more being inserted. Her husband's testimony was corroborative, and to the effect that Dr. Smith removed the last of the gauze on Sunday. It will be noted that none of the witnesses pretend to account for the gauze inserted by Dr. Smith after removing the pads put in by Dr. Schooler, but it appears to have been several times longer than that extracted by Dr. Schmidt. Of course neither of the defendants intentionally allowed any foreign substance to remain in the abdomen. No one so claims. But the jury might have found that the gauze was taken therefrom as testified by Dr. Schmidt; that it should have been removed within a few days after the operation; that the failure of the wound to heal indicated an abnormal condition; and that, even though the patient had suffered from specific infection, this exacted careful examination as to the cause; and that, all this being so, the issue as to whether had defendants exercised that degree of skill and care required of them, the gauze would have been discovered and removed before plaintiff left the hospital, was for the jury to determine.

IX. The jury allowed damages in the sum of

\$2,000, and it is contended by appellants that this is excessive. We are inclined to this view. It will be recalled that the operation was performed January 16, 1905, and that the gauze might properly have been allowed to remain for about a week, and it was removed February 27th following. The circumstances that the wound healed within a few days thereafter tended strongly to show that the consequences were not serious. That she recovered immediately after the operation for hernia in April, 1906, tended to prove that the suffering from melancholia, headache and insomnia were due to the hernia, rather than other conditions produced by leaving the gauze pad in the abdomen. Dr. Schmitt thought the hernia due to the last-mentioned cause, but admitted that it was likely to result from a second or third operation at the same locality. It is exceedingly doubtful whether the record warrants the inference that the hernia was attributable to the delay in healing, due to the gauze pad. In view of this circumstance and plaintiff's condition prior to the operation, we think she ought not to have been allowed to exceed \$1,200, and if plaintiff shall file a remittitur of all above that sum within thirty days from the filing of this opinion, the judgment will be affirmed; otherwise reversed.—*Affirmed* on condition.

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W. E. BROCKELSBY, Appellant, v. WESTERN UNION TELEGRAPH Co., Appellee.

**Telegraphs:** DELAY IN DELIVERY: DAMAGES: NOTICE. In this action

- 1 for damages for negligent delay in the delivery of a telegram it is held that a letter written by plaintiff's employer notifying the telegraph company of the delay, and reciting that plaintiff's employer demanded damages in settlement of the claim, did not constitute a notice of any claim by plaintiff, as required by the statute, and was insufficient to sustain an action by him.

**Same:** JOINT CAUSE OF ACTION. Although a telegraph company may  
2 be liable to either or both the sender and sendee for delay in  
delivering a message it does not follow that they have a joint  
cause of action.

**Same:** NOTICE OF CLAIM. Although the filing of a petition in an  
3 action alleging damages for negligent delay in the delivery of  
a telegram and the personal service of an original notice may be  
sufficient notice to the telegraph company of the claim, as required  
by the statute, still the filing of the petition and service of the  
notice must be within sixty days from the time the cause of ac-  
tion accrued to be available as a statutory notice.

*Appeal from Marshall District Court.*—HON. C. B. BRAD-  
SHAW, Judge.

SATURDAY, JULY 9, 1910.

ACTION for damages for negligent delay in the delivery  
of a telegraphic message. There was a demurrer to the  
petition which was sustained. On the plaintiff's election  
to stand on his petition, judgment was entered dismissing  
the same and for costs. Plaintiff appeals.—*Affirmed.*

*Boardman & Lawrence*, for appellant.

*Carney & Carney*, for appellee.

EVANS, J.—It appears from the averments of the peti-  
tion that on March 18, 1908, the plaintiff was a traveling  
salesman in the employ of Sinclair Tea & Coffee Company  
of Marshalltown. On said day he was arrested in the town  
of Audubon for the alleged violation of an ordinance in  
that he was selling goods in such town as a transient  
merchant without first obtaining a license. On trial he  
was convicted. Whether any punishment was imposed does  
not appear from the petition, but we so infer from the  
argument. The appeal bond was fixed at \$50. The plain-  
tiff advised his employer of his conviction, and the employer

proceeded to procure the \$50 appeal bond in accord with plaintiff's request. The Sinclair Company at Marshalltown procured P. S. Balch, an officer of the First National Bank of Marshalltown, to make a telegraphic request of the First National Bank of Audubon to provide such appeal bond upon the guaranty of the said Balch. Such telegram was as follows: "Marshalltown, Iowa, March 18, 1908. First National Bank, Audubon, Iowa: Provide appeal bond Brockelsby in mayor's court \$50.00. Will guarantee you. Letter follows. P. S. Balch." This message was delivered at the defendant's office at Marshalltown at 4:40 p. m., but was not delivered at Audubon until 7:25 the following morning. It is averred in the petition that on account of such negligent delay plaintiff was placed in jail and compelled to remain overnight, and suffered great mental and bodily pain and anguish because thereof.

The principal point made by the demurrer and argued here is that it does not appear from the petition that the plaintiff presented his claim in writing within sixty days

from the time his cause of action accrued,

1. TELEGRAPHS:  
delay in de-  
livery: dam-  
ages: notice.

as required by section 2164 of the Code. The petition does show that on April 20, 1908,

the Sinclair Company wrote to the defend-

ant the following letter: "April 20, 1908. Western Union Telegraph Co., City—Gentlemen: On March 18th, at 4:40 p. m. we delivered message at your office to be sent to Audubon, which message called for the providing of bonds for one named Brockelsby, who was under arrest and who was being held until the bonds arrived. For some unknown reason, this message did not reach Audubon until 7:25 the following morning and on account of this delay, Brockelsby was placed in a dirty jail and left there over night without any fuel. There has certainly been some gross carelessness on the part of some one. It was an outrage for a man to be placed in a place of this kind when the bonds were all provided for, but delayed on account of

transmitting the message. A letter would have reached Audubon as soon as this message did. We therefore ask damages from your company for this delay to the extent of \$500, and demand settlement of same. Yours very truly, Sinclair Tea & Coffee Co."

It is urged by plaintiff that this letter was a sufficient compliance with section 2164. If such letter had been written by the plaintiff or had purported to be written in his behalf, the claim of plaintiff in this respect might be conceded. But such is not the case. There is not a suggestion in the letter that the writer is acting for or on behalf of Brockelsby. The Sinclair Company makes the demand for itself as alleged sender of the message. It is argued, however, by the plaintiff that the statute only requires that written notice be given to the company within sixty days, and that this letter constituted such written notice, and that it is immaterial by whom such notice was given. What the statute does require in terms is that a "claim therefor" (the damages) shall be "presented in writing to such company within sixty days from time cause of action accrues." It will be noted that the plaintiff was neither sender nor sendee of the message and the same is to be said of his employer, the Sinclair Company. The case, however, has been argued at this point as though the Sinclair Company was the sender and the plaintiff was the sendee, and we will consider the argument from that point of view.

Granting that the telegraph company may in a given case be liable to either sender or sendee of the message or to both, it does not follow that sender and sendee have a joint cause of action as argued by the plaintiff. The company may be liable to each or to one only; and if liable to each, its liability to each is measured by the amount of damages sustained by each.

2. SAME:  
joint cause  
of action.

Granting again that the relation of sender and sendee

to the subject of the message may be such as to give rise to a joint cause of action for damages for negligent delay, yet nothing of that kind is disclosed by the petition in this case. The cause of action sued on is one arising, if at all, to the plaintiff alone. If the same negligent delay resulted in damage to the Sinclair Company also, its cause of action therefor was legally distinct from that arising in favor of the plaintiff. A settlement or satisfaction of its claim made in its own behalf could not operate as a bar against this claim of plaintiff as arising out of the same delay.

We have recently held in effect in *Seddon v. Western Union Telegraph Company*, 146 Iowa, 743, that the presentation of the claim in writing is not necessarily a condition precedent to the bringing of suit. The statute itself assumes that a cause of action may accrue before the presentation of the claim. We held, therefore, in the cited case, that the filing of a petition within sixty days and the personal service of an original notice returnable within sixty days from the time the cause of action accrued, was a compliance with this requirement of the statute both in letter and in spirit. In the case at bar, the suit was not commenced for more than one year after the cause of action accrued. The plaintiff never presented in writing a claim for his alleged damages. It is argued, that the letter above quoted gave to the defendant company written notice of the facts upon which this present action is based. This letter, however, conveyed no notice to the company that the plaintiff was making any claim. We had occasion to consider this particular phase of the question in the case of *Yunker v. Western Union Telegraph*, 146 Iowa, 499. The conclusion reached in that case is adverse to the position of the appellant, and further reflection confirms us of the correctness of such conclusion. The point is argued in the opinion in that case, and it

3. SAME:  
notice of  
claim.



would serve no useful purpose to repeat the argument. This disposes of the principal point argued by the parties. It should not be implied, however, that we deem the plaintiff's petition as disclosing a good cause of action in other respects.

The judgment of the trial court will be *affirmed*.

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GEORGE STOTELMEYER, Appellee, v. CHICAGO, M. & ST. P. R. R. Co., Appellant.

**Evidence: PHOTOGRAPHS: CONCLUSIVENESS.** Photographic evidence  
1 must be considered in connection with all of the evidence on the subject to which it refers, and is not in itself so conclusive that the testimony of witnesses in apparent conflict must be disregarded.

**Railroads: CROSSING ACCIDENT: CONTRIBUTORY NEGLIGENCE: EVIDENCE.**  
2 In this action for injury to plaintiff resulting from a collision with a train at a highway crossing, the evidence is held to require submission of the issue of the contributory negligence of plaintiff and the driver of the vehicle.

**Same: INSTRUCTIONS.** In this action there was evidence that the  
3 plaintiff when some distance from the crossing stopped and looked for an approaching train and that when still nearer the crossing he stopped again and looked but saw no train, and it is held that an instruction to the effect that the plaintiff and the driver were required to look and listen for trains within a reasonable distance from the crossing, and when this was done and no train was seen or heard the jury must determine whether they were bound in the exercise of ordinary care to stop, look and listen at some nearer point to the crossing, was not objectionable as permitting the jury to find that although they stopped, looked and listened on the first occasion and not afterwards they were not negligent; especially as the court in a subsequent instruction cautioned the jury against such an assumption.

**Same: INSTRUCTION.** Where it appeared that the driver of a vehicle  
4 in which plaintiff was riding looked for an approaching train before driving upon the track and there was none in sight or hearing, plaintiff, though chargeable with any negligence of the driver in this regard, was not guilty of negligence because failing him-

self to look and listen for the train, but the action of the driver in so looking was a proper circumstance to go to the jury on the question of plaintiff's negligence; and the instruction submitting this question is not open to the objection that its indirect effect was to impute to plaintiff freedom from contributory negligence because of the statement therein that plaintiff was chargeable with the negligence of the driver.

**Evidence:** **OBJECTION:** **REVIEW:** **HARMLESS ERROR.** The discretion of 5 the trial court in permitting leading questions will not ordinarily be interfered with on appeal: Nor will a cause ordinarily be reversed because of the reception of immaterial evidence; as the objection of immateriality is more for the protection of the court and the dispatch of business than for the benefit of litigants. In the instant case the evidence though incompetent is held to have been nonprejudicial.

*Appeal from Appanoose District Court.*—HON. C. W. VERMILLION, Judge.

SATURDAY, JULY 9, 1910.

**ACTION** for damages for personal injuries alleged to have been sustained in a collision at a highway crossing. There was a verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

*F. S. Payne, J. C. Cook, and C. E. Broman, for appellant.*

*Howell & Elgin, for appellee.*

**EVANS, J.**—At the close of the evidence defendant moved for a directed verdict. This motion was denied by the trial court and error is assigned upon such ruling, and we give our first consideration to this question.

The accident involved in the inquiry occurred on February 17, 1907, at about two o'clock a. m., at a highway crossing defendant's railway between Jerome and Seymour. The plaintiff and one Linn had procured a team

and driver to take them from Jerome to Seymour. They were riding in a single-seated top buggy. The night was somewhat cold and the buggy top was up and inclosed by side curtains. The plaintiff and Linn occupied the seat proper and the driver, one Pollock, a boy sixteen years of age, sat upon their knees so that he occupied a position a little in front of them. They were driving east. The defendant's railway lay to the south of them before they reached the crossing, and extended in a general northeasterly direction. At the crossing in question the railway crossed the highway at an acute angle of about twenty degrees. For a distance of two or three hundred feet from the crossing, the grade of the highway was about six feet lower than the grade of the railway; the highway rising quite abruptly to the grade of the railway in the last twenty-five feet west of the crossing. The center line of the highway entered the right of way space of the railway, one hundred and eighty-five feet west of such crossing. That is to say, at a point one hundred and eighty-five feet west of the crossing, the center of the highway was fifty feet north of the center of the railway track. From this point the lateral approach of the highway to the railway was gradual. In the last twenty-five to fifty feet of the highway west of the crossing it was so close to the railway track that a train approaching from the southwest would come from behind a team driving east. To this extent the evidence is practically without dispute. The evidence also tended to show that along the south side of the highway there was a hedge which obstructed the view to the south, and this hedge extended east to a point about where the south line of the highway intersected the north line of the right of way. The plaintiff testified that at a point about one hundred and fifty or two hundred feet west of the crossing they stopped the team, and that he and the driver looked in both directions for a train and saw none; that this occupied about two minutes' time; that at fifty or sixty feet from the crossing

they stopped again and looked likewise and failed to see any train; that they were driving on a walk; that the road at this point was a narrow embankment twelve or fourteen feet wide, with the railway to the right of them and a ditch to the left of them which prevented any escape by turning around in case of emergency; that when they were about twenty-five feet from the crossing, the light of the approaching train suddenly streamed upon them; that the driver tried to stop his team, but it became unmanageable and rushed forward; that a collision thereby occurred which resulted in the killing of the driver and one of the horses, and in an injury to the plaintiff who was carried upon some part of the locomotive for a distance of six hundred and fifty feet.

Much testimony was introduced on behalf of plaintiff to the effect that the hedge referred to was such an obstruction to the view that a train could not be seen from the

highway until within a very short distance from the crossing. On the other hand, the defendant put in evidence certain photographs

1. EVIDENCE:  
photographs:  
conclusiveness.

and plats and certain measurements tending to show that from any point two hundred and fifteen feet or less on the highway west of the crossing, a clear view could be had of the railway track for a distance of from one thousand to two thousand feet. It is argued that this evidence is conclusive, and that the court should accept it as such, and that the testimony on behalf of plaintiff should be disregarded in so far as it appears to contradict this evidence on behalf of defendant. It is upon this theory that the defendant contends for its right to a directed verdict. There are several reasons why defendant's position is not tenable. We have examined the photographs, and they do not impress us as at all conclusive in support of the defendant's theory. It is a matter of common knowledge that a photograph is not always true in its perspective and does not necessarily present distances nor angles as they are.

Nor does it always present the relative size or relation of objects at varying distances. This is illustrated by an examination of the three photographs introduced in evidence by the defendant, which present to the eye a somewhat conflicting appearance of the same topographic view. While, therefore, a photograph has its proper uses and is a great aid in arriving at the truth, it may also have its own unavoidable deceptions. It is a matter of common observation that the photographs introduced in evidence by opposite parties sometimes present as great apparent conflict as the testimony of opposing witnesses. The most, therefore, that can be said for photographic evidence is that in any given case it must be considered in the light of all the evidence, and with due regard to its natural limitations.

The measurements and plats introduced by the defendant tend to show that at a point two hundred and thirty feet west of the center of the crossing the railway track would be visible to a person on the highway for a distance not less than six hundred feet west of the crossing. This latter distance of view of the track would diminish as the distance from the crossing to the point of view on the highway was increased. It appears that the plaintiff, from any point of the highway within two hundred feet of the crossing, could have seen the train one thousand feet or more southwest of the crossing, and it is argued that he was therefore necessarily guilty of contributory negligence in failing to discover the train before reaching the point of collision. It is conceded that the train was going at a very high rate of speed, estimated by defendant's witnesses at thirty-five to forty miles an hour. It came down a descending grade, there being a fall of four feet in the one thousand, one hundred and forty feet of track next west of the crossing. Just west of the crossing there was a comparatively sharp curve in the track bearing more to the south

2. RAILROADS:  
crossing acci-  
dent: contribu-  
tory negli-  
gence: evi-  
dence.

of west. Assuming the truth of plaintiff's testimony that at fifty or sixty feet from the crossing they did stop and look and listen for a train in both directions, and that this stop occupied one minute or more, it does not follow that they must have seen the approaching train at that time. Plaintiff was required to look in both directions. The stopping and adjusting of robes and starting occupied a little time, and it was not impossible that the train could have been more than two thousand feet away at the very moment that the plaintiff or the driver looked in that direction and yet have covered the distance in time for the collision. There is the further consideration that at this point the position of the buggy was such that the occupants must look behind them, in order to locate the train. They could fail to take accurate account of the curve, and thus fail to look in exactly the right direction.

It cannot be said as a matter of law that such a mistake, if made, would be negligence. The testimony on behalf of plaintiff shows that the train approached the crossing without any signals, either of whistling or ringing the bell. It must be borne in mind also that this is not a case where the plaintiff or his driver drove upon the track. The defendant has argued this case as though it were the ordinary case of a plaintiff driving upon the track in necessary view of an oncoming train, and the authorities cited are cases of that character. In such case the power of the driver to save himself by stopping his team exists ordinarily up to the very moment that he passes upon the track, and his duty to exercise his senses of sight and hearing before he does so is imperative. In this case, the plaintiff and the driver did not come voluntarily within twenty-five feet of the crossing proper, although the lateral distance between them and the track was somewhat less. True, they were within the zone of danger in that their proximity to the track might result in the frightening of their horses by the passing train. But they had to en-

counter danger for a linear distance of nearly two hundred feet. This particular danger necessarily increased as they approached the crossing. At what particular point in such approach such danger became imminent or forbidding was a question upon which there might be a fair difference of judgment. Certain it is that for the full distance of one hundred and eighty-five feet some risk of subjecting the horses to fright had to be taken, unless a train was actually in sight when that portion of the approach was entered. Whether, therefore, under all the circumstances disclosed by the evidence, the plaintiff and the driver were free from negligence in their method of approach to such crossing, was, in our judgment, clearly a question of fact to be determined by the jury, and the trial court did not err in refusing to direct a verdict on the ground of contributory negligence.

II. Complaint is made of the fifteenth instruction given by the trial court, which is as follows: "(15) Plaintiff and said driver were required to look and listen for approaching trains within a reasonable distance from the crossing, and if this was done and no train was seen or heard it is for the jury to say whether they were bound in the exercise of ordinary care to stop and look and listen or to look and listen without stopping at some other point nearer to the crossing, and while negligence, if any, on the part of the defendant's employees operating said engine would not excuse plaintiff or said driver from exercising due care on their part, yet they had a right to assume that the crossing signals required by law would be given, and that an engine approaching said crossing would not be negligently operated."

It is not claimed that this instruction is not correct as an abstract statement of the law. It is claimed, however, that by applying it to the particular evidence of this case it would permit the jury to find that even though the plaintiff had stopped and looked and listened only when about

one hundred and fifty or two hundred feet from the crossing and not afterwards, that such stopping and looking and listening at such distance was sufficient showing of want of negligence. It is argued that the jury should have been instructed that under such state of facts the plaintiff was guilty of negligence as a matter of law. This argument rests upon a very strained construction of the instruction, even though it stood alone. In the light of other instructions given, the argument has no basis whatever. And this remark disposes also of the claim of conflict between the fifteenth and sixteenth instructions. The sixteenth instruction guarded the jury against the very assumption which appellant claims the jury might have adopted under instruction 15. In other words, the construction of instruction 15 adopted by appellant in argument is negated by instruction 16, and this is the only conflict presented.

III. In a number of instructions the trial court laid upon the plaintiff the burden of proving not only that he himself was free from negligence contributing to his injury, but that the driver was also free from such negligence. In other words, the trial court instructed the jury that the negligence of the driver would be imputed to the plaintiff, if it contributed to the injury. It is argued by appellant that this was erroneous, and authorities are cited to the effect that the negligence of a driver under such circumstances can not be imputed to the plaintiff. *Nesbit v. Town of Garner*, 75 Iowa, 314; *McBride v. Des Moines*, 134 Iowa, 398; *Willfong v. O. & St. L. R. Co.*, 116 Iowa, 548; *Bailey v. Centerville*, 115 Iowa, 271. Appellant concedes that on the face of it this error only laid an undue burden upon the plaintiff, and furnishes appellant no ground of complaint. It is argued, however, that the indirect effect of this instruction was prejudicial to the defendant in that, as a matter of argument, if the negligence of the driver could

4. SAME:  
instruction.



be imputed to the plaintiff, his freedom from negligence could likewise be imputed to the plaintiff, and that the defendant suffered at this point. In elaboration of this argument it is said that the court adopted this view in its fourteenth instruction, which is as follows: "(14) The exercise of ordinary care required that before they went upon said crossing plaintiff or said driver should look and listen for trains, and if they failed to do so it would constitute contributory negligence, or if they or one of them did so look and listen and there was a train then in plain sight or hearing so circumstanced or situated as to suggest a reasonable probability of danger in going upon the track or in approaching nearer thereto, then to do so would constitute contributory negligence, and in either case plaintiff could not recover."

Without passing upon the abstract correctness of this instruction, it is clear to us that it presents no ground of complaint to the appellant. This instruction dealt with contributory negligence as a question of law. Surely, if the driver looked for an approaching train and saw none, and there was none in plain sight or hearing so situated as to suggest a reasonable probability of danger in going upon the track or in approaching thereto, it can not be said as a matter of law that the plaintiff was guilty of contributory negligence in merely failing to duplicate the action of the driver. The instruction gave the plaintiff no protection against the negligence of the driver in this respect. If the driver looked and failed to see or hear when he ought to have seen or heard, then his looking and listening was not a protection to the plaintiff under this instruction. The driver was in a better position to look and listen than was the plaintiff. If the driver did look and listen and did exercise reasonable care under all circumstances, it was a proper circumstance to go to the jury on the question of plaintiff's contributory negligence. The instruction complained of went no further than this, and

we have no occasion to consider the question whether, if the driver exercised reasonable care, such care should be imputed to the plaintiff as a matter of law.

IV. During the examination of plaintiff as a witness, his counsel put to him the following questions: "Q. George, if you would have heard any train tell the jury

whether or not you would have drove right up on the track or had the driver do so?

S. EVIDENCE:  
objection:  
review: harm-  
less error.

A. No, sir; I would not. Q. If you had heard that whistle, would you have permitted, if you could have helped it, the driver to drive toward the track after hearing the blasts until after the train passed? A. No; I would not have had him to drive up there if I could have helped it." These questions were objected to by the defendant, and the objections were overruled. The evidence was clearly incompetent, but it is not claimed that any objection was made to it on that ground. It is stated in appellant's abstract that these questions were objected to as "leading and immaterial." It is claimed in appellee's abstract that the only objection urged was that each question was "leading." The questions were not vulnerable to the objection that they were leading, and if they had been, we would not interfere with the discretion of the trial court in permitting leading questions. Nor would we ordinarily reverse a case for an erroneous ruling in receiving evidence that was merely immaterial. The objection that proposed evidence is immaterial is intended as much for the protection of the court and its record and the dispatch of public business, as for the special benefit of the litigants as such. We think this evidence now under consideration was clearly nonprejudicial, even though the objection of incompetency had been made to it.

V. Other points are presented by appellant. But they are so related to the points already considered that what we have said is decisive of them all.

We find no error in the record, and the judgment of the court below must be *affirmed*.

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ELIZABETH MOHN, Plaintiff, and WILLIAM MOHN and JOHN F. MOHN, Interveners, Appellants, v. LOTTIE MOHN, ORA RUSSELL MOHN, MINNIE MOHN and FLORENCE JUNE MOHN, Appellees.

**Wills: CONSTRUCTION: LIFE ESTATE.** Where a will gives to the  
1 widow land during her life or during her widowhood, and provides that upon her death a son shall have it at a specified price, the proceeds to be divided among the children, the widow takes a life estate.

**Same: DEVISE TO WIDOW: DISTRIBUTIVE SHARE: ELECTION: STATUTES.**  
2 Under our prior statutes the widow might ordinarily take both a life estate and a distributive share in her husband's property, but where by the terms of a will she was given a life estate in the property, and a claim to her distributive share in addition to the devise created such an inconsistency as to defeat some provision of the will, she could not take both but was required to elect which she would take.

**Same: ELECTION BY WIDOW: SUFFICIENCY.** The report of a widow  
3 as executrix showing full settlement of the estate, in which she claimed that she was entitled to a life estate under the will and asked for a discharge, was a sufficient election to take a life estate in lieu of dower.

**Same: CONSTRUCTION: ESTATE DEVISED.** A will providing that on the  
4 death of a life tenant a certain heir shall have the land at a specified price, and that the proceeds thereof shall be divided among all the children, operates as a gift of the land to such heir charged with payment of the price to the other children, rather than a mere option to purchase the same.

**Same: WHO MAY QUESTION DECREE.** A widow who is given only a  
5 life estate in property can not complain of a decree creating a vested interest therein in another.

**Same: ACCEPTANCE OF BEQUEST: PRESUMPTION.** The devisee of a  
6 beneficial interest under a will will be presumed to have accepted the same; but he may withhold his assent and renounce the provisions made for him, in which case no interest passes to him.

**Same:** OPTION TO PURCHASE. A mere option to purchase land in accordance with the provisions of a will does not ordinarily confer any rights upon the optionee's representatives or successors.

**Same:** REQUEST SUBJECT TO A CHARGE UPON THE PROPERTY: PASSING OF TITLE. Where a testator bequeaths the life use of his real estate to his wife and upon her death to a certain heir at a specified price, the proceeds to be equally divided among all his children, and there is no gift over in case such heir elects not to purchase, it is generally held that the devise creates simply a charge upon the land, and is not a condition precedent to the passing of title.

**Same:** CONTINGENT REMAINDER. Even though such a bequest should be held to create a contingent remainder, the contingency is one of event and not of person, and such an estate may be sold and will also pass to the devisees successors. But in the instant case the devisee elected to accept the bequest, and thus obligated himself and his heirs to pay the charges against the same.

**Same:** PURCHASE OF LIFE ESTATE: ORAL CONTRACT: STATUTE OF FRAUDS: EVIDENCE. An oral contract for the purchase of land is taken out of the statute of frauds where the vendee has taken possession under the contract, or where there is any other circumstance which, by the law in force when the statute was passed, would have taken the case out of the statute.

In the instant case the devisee taking the property charged with the widow's life estate and the payment of a stipulated price to other heirs, was, at the time of testator's death, living with him upon the property and managing the same, and subsequently continued the occupancy with the widow as her tenant. Thereafter pursuant to an oral contract for the purchase of the widow's interest she surrendered complete possession and the devisee made extensive improvements.

*Held*, sufficient to show a contract of purchase and to take the same out of the statute of frauds.

*Appeal from Jones District Court.*—HON. W. N. TREICHLER, Judge.

SATURDAY, JULY 9, 1910.

ACTION originally brought by plaintiff Elizabeth Mohn to quiet title to the lands in controversy. Defendants denied that plaintiff held anything more than a life estate in and to the lands, and this they alleged she had sold to

defendant Philip G. Mohn, now deceased, during his lifetime. They also alleged that plaintiff had been in possession of the premises since the death of Philip G. Mohn, and they asked an accounting and that she be enjoined from interfering with defendants' taking possession. The claim for an accounting was dismissed without prejudice during the trial of the case. William Mohn and John F. Mohn, sons of Conrad Mohn, deceased, intervened in the action and asked that the fee title be declared to be in the original plaintiff. On these issues the case was tried to the court, resulting in a decree dismissing plaintiff's and interveners' petitions and quieting title to the lands in defendants. Plaintiff and interveners appeal.—*Affirmed.*

*Randall, Courtney & Harding and Jamison, Smyth & Hann, for appellants.*

*Remley & Remley, Chas. W. Kepler & Son, and E. A. Johnson, for appellees.*

DEEMER, C. J.—Conrad Mohn died testate October 29, 1891, and his will was admitted to probate at the March, 1892, term of the Jones county district court. He left surviving his widow, Elizabeth Mohn, plaintiff in the present action, Philip Mohn, now deceased, John F. Mohn and William Mohn, interveners, and Minnie Mohn Murfield, one of the defendants, sons and daughter, his sole and only heirs at law. The widow is still living and unmarried. Philip Mohn died on or about October 9, 1906, leaving surviving his widow, Lottie Mohn, and Ora Russell Mohn, Conrad Mohn, and Minnie Mohn, defendants, his children. Since his death there was born to his widow a daughter, Florence June Mohn, who is also a defendant.

The will of Conrad Mohn, which lies at the bottom of this controversy, reads as follows:

Know all men by these Presents that I, Conrad Mohn, of the county of Jones and State of Iowa of the age of Sixty-five years being of sound and disposing mind do hereby make Publish and declare this my last will and Testament in manner following hereby Revoking all former wills made by me.

1st. I, order and direct that all Just debts shall be Paid out of my Estate.

2nd. I give my wife Elizabeth Mohn my farm consisting of the following described Premises (to wit) The West half ( $\frac{1}{2}$ ) of the north East quarter ( $\frac{1}{4}$ ) of Section Twenty-Eight (28) in Township Eighty-three (83) north of Range four (4) west of the 5th P. M. containing Eighty (80) acres more or less, Also the north East quarter ( $\frac{1}{4}$ ) of the north East quarter ( $\frac{1}{4}$ ) of Said Section Twenty-Eight (28) in Township and Range above described containing forty acres more or less, Also the west half ( $\frac{1}{2}$ ) of the South West quarter ( $\frac{1}{4}$ ) of the South East quarter ( $\frac{1}{4}$ ) of Section Twenty-one (21) in Township and Range above described containing Twenty (20) acres more or less, During life or so long that she shall Remain my widow.

3rd. I Give and Bequeath to my son Williams two Daughters my organ.

4th. I Give and Bequeath to my said wife Elizabeth Mohn all of my Personal Property consisting of household goods, monies and credits and all other Personal Property on the Premises Belong to me Excepting organ formerly Bequeathed.

5th. I direct that after the Death of my wife my son Philip Mohn shall have the Land above described as forty-five dollars Per acre and the Proceeds of the same shall be divided among all my children, share and share alike.

6th. I order that my son Williams share shall Remain in said farm until all of his children shall Become of age then three Hundred dollars shall be Paid to him and the Bal of the shall be divided among his children share and share alike.

7th. I order that my said son William Mohn shall Receive the Interest on his share from the Death of my said wife until his children Becomes of age then the Principal be divided Between them share and share alike

after the Payment of the three hundred dollars to my said son William Mohn as above stated.

8th. And lastly I appoint my said wife Executor of this my last will and Testament.

Signed this first day of October, 1891. Conrad Mohn.

The above Instrument Consisting of one Sheet was at the date thereof signed and declared by the said Conrad Mohn as and for his last will and Testament in Presence of us, who at his Request and in his Presence have subscribed our names as witnesses thereto.

H. C. Kurtz, Lisbon, Linn county.

John E. Kurtz, Lisbon, Linn county.

In order to avoid confusion we shall call the widow and interveners plaintiffs, as their claims are identical, and, save as hereinafter indicated, we shall treat the defendants as the representatives or successors of Philip Mohn, deceased.

Plaintiffs claim: First, that under the will of Conrad Mohn, deceased, Elizabeth Mohn, widow, took title to the real estate left by testator in fee simple absolute; second, that if she did not take the real estate in fee under the will, she took a life estate in all the lands and an undivided one-third in fee simple; and third, that in any event she is entitled to her distributive share in all the real estate left by her deceased husband, because she has in no manner surrendered the same. Again plaintiffs contend that nothing passed under the fifth paragraph of the will save an option in Philip G. Mohn to purchase at the time of the death of the widow of Conrad, and that as Philip died without exercising his option, nothing passed to defendants as his successors under this fifth paragraph. Further claim is made that if the fee did not pass to Conrad's widow under the will, it did not pass to Philip and that the real estate should pass as if it had never been devised. Defendants contend that nothing but a life estate passed to plaintiff, the widow; that this she sold for a valuable consideration to Philip during his lifetime;

that the widow elected to take a life estate in lieu of dower and that they, defendants, are entitled to have the title quieted in them to all the lands in controversy because Philip took a vested estate under the fifth paragraph of the will, burdened only with a lien to the amount of forty-five (\$45) dollars per acre upon the land, to be divided among all of testator's children or their successors, share and share alike.

The first question is the nature of the devise to Elizabeth Mohn. A careful reading of the will indicates that it gave the real estate described to the widow during life or so long as she shall remain testator's

1. WILLS:  
construction:  
life estate.

widow. No other reasonable construction can be placed upon the second paragraph of the will. The following, among other cases, are conclusive upon this proposition: *Spaan v. Anderson*, 115 Iowa, 121; *Podaril v. Clark*, 118 Iowa, 268; *Simpkins v. Bales*, 123 Iowa, 64; *Steiff v. Seibert*, 128 Iowa, 748; *Wenger v. Thompson*, 128 Iowa, 754; *Webb v. Webb*, 130 Iowa, 460; *Scott v. Scott*, 132 Iowa, 37; *Hoefliger v. Hoefliger*, 132 Iowa, 576; *Luckey v. McGray*, 125 Iowa, 693.

II. Testator died and the will was admitted to probate prior to the adoption of the Code of 1897. At the time of the probate of the will the statute with reference to

2. SAME: devise  
to widow:  
distributive  
share: elec-  
tion: statutes.

the widow's distributive share read as follows: "Any person of full age and sound mind may dispose, by will, of all his property except what is sufficient to pay his debts, or what is allowed as a homestead, or otherwise

given by law as privileged property to his wife and family." McClain's Code, section 3522 (section 2322, Code 1873.)

"When the interests of creditors will not thereby be prejudiced a testator may prescribe the entire manner in which his estate shall be administered on; may exempt the executor from the necessity of giving bond, and may prescribe the manner in which his affairs shall be conducted



until his estate is finally settled, or until his minor children become of age." McClain's Code, section 3610 (section 2406, Code 1873). "One-third in value of all the legal or equitable estates in real property, possessed by the husband at any time during the marriage, which have not been sold on execution or any other judicial sale, and to which the wife has made no relinquishment of her right, shall be set apart as her property in fee simple, if she survive him." McClain's Code, section 3644 (section 2440, Code 1873). The widow's share can not be affected by any will of her husband, unless she consents thereto within six months after notice to her of the provisions of the will by the other parties interested in the estate, which consent shall be entered on the proper record of the circuit [district] court." McClain's Code, section 3656 (section 2452, Code 1873).

Plaintiffs claim that the devise of the life estate to the widow was not inconsistent with her right to distributive share of one-third in the entire estate, and that she is entitled to both life estate and distributive share under the statutes before quoted. That there is some confusion in our cases construing these statutes is conceded. The underlying principle is that if there be such inconsistency between the estate devised and distributive share that the claim to the devise and to distributive share will defeat some provision of the will, the widow can not have both, but must elect as to which she will take. Manifestly it was testator's intent, under the second paragraph of the will, to give his widow a life estate, or rather a life estate or an estate during her widowhood, and by the fifth, sixth and seventh paragraphs he intended that upon the death of his wife the lands be sold, and at least \$45 per acre of the proceeds thereof was to be divided among all his children, share and share alike. Whatever may be said regarding the legal effect of these last-named paragraphs of the will, it is clear that testator contemplated the disposition or sale of all his real estate in which his wife had

been given not more than a life estate and a distribution of the proceeds thereof. To give the widow one-third in fee, in addition to the life estate, would be inconsistent with the provisions of the will. In *Snyder v. Miller*, 67 Iowa, 261, it is said, regarding a like situation: "We can not adopt the claim of appellee's counsel that, in the direction to sell the real estate in the seventh paragraph, and in the disposition of the residue of his property in the sixth paragraph, the testator did not mean to dispose of all the real estate—all of the property—but only such interest in it as he owned, which was two-thirds; the one-third being the property of his wife. This construction appears to us to be strained and unnatural. He plainly directs the sale of the real estate—the land—and not any interest in the land. If he had intended to direct the sale of an undivided two-thirds of the land, he surely would have so stated."

In *Parker v. Parker*, 129 Iowa, 600, we said: "The controlling principle in all of the cases, which have allowed the widow to take under the will and under the law at the same time, is that her claim is not inconsistent or incompatible with the terms of the will. With this thought in mind, it is at once apparent that an application of the rule to a particular case depends wholly upon the will under consideration and can not be controlled by cases construing wills with different provisions." See as further sustaining these conclusions: *Daugherty v. Daugherty*, 69 Iowa, 677; *Warner v. Hamill*, 134 Iowa, 279; *Cain v. Cain*, 23 Iowa, 31. Some of our earlier cases doubtless announced a broader rule than this court is now willing to adopt, as will appear from some of the opinions just cited.

*Warner v. Hamill*, 134 Iowa, 279, relied upon by plaintiffs, is not in point. There was no direction that the real estate be sold as in the instant case, and the court found no such condition of repugnancy between the widow's taking distributive share and the other provisions of the will as to force her to an election. In that case we quoted

approvingly from *Herr v. Herr*, 90 Iowa, 538, *Daugherty v. Daugherty*, 69 Iowa, 677, and *in re Franke's Estate*, 97 Iowa, 704, the rule which we now adhere to.

Doubtless the court in construing the statutes found in the Code of 1873 did not at all times make proper distinctions or definitely preserve the lines of demarcation between the fact questions presented. It is true that ordinarily speaking there is no necessary inconsistency between a life estate in all of testator's land and a fee to one-third thereof in fee simple. That is to say, the widow might, in ordinary cases under the old statute, take both in so far as the claim of repugnancy between the two is concerned, but she could not take both, if the claim of distributive share in addition to the devise by will had the effect to defeat some other provision of the will. That testator intended a sale of the entire estate upon the death of his wife, and that neither she nor her successors should have any part of the proceeds of the sale or any title to the lands remaining at her death, is too clear for argument, and under previous holdings the widow was put to an election to take the lands described during life, or so long as she remained unmarried, or her distributive share under the statutes herein referred to.

III. Being required to elect, the question yet remains: Did she elect as provided by the statutes quoted, or has she so conducted herself as to be barred of her right to distributive share by reason of estoppel or election? This again is a troublesome question upon which our previous cases are in some confusion. The general rule announced by our previous cases is that to estop the widow from claiming under section 2452 of the Code of 1873 there must be a strict compliance therewith. *Bailey v. Hughes*, 115 Iowa, 304; *Byerly v. Sherman*, 126 Iowa, 447; *Jones v. Jones*, 137 Iowa, 385. But in many cases it has been held that an election need not be in writing, although it must in some

3. SAME:  
election by  
widow:  
sufficiency.

manner be made of record in the probate court. *Baldozier v. Haynes*, 57 Iowa, 683; *Houston v. Lane*, 62 Iowa, 291. In at least one case, to wit, *Goldizen v. Goldizen*, 107 Iowa, 280, a widow was estopped by conduct from claiming distributive share, although consent to take under the will was not entered of record. See, also, *Koep v. Koep*, 146 Iowa, 179.

No attempt need be made to harmonize these cases, for the record shows that the widow was appointed executrix of the will of her husband, and that she filed a final report in the probate court wherein she stated, among other things: "That under the terms of the will she was entitled to all the real estate during her lifetime and that she was given all the personal property of every description owned by deceased, except an organ which was willed to the daughters of her son William. . . . That the debts due by deceased and which she was required to pay by the terms of the will, she would report that the only debts owing by the deceased were as follows: . . . All of which she has paid together with the costs of administration.

. . . More than two years have expired since publication of notice of her appointment as executrix, and no other claims having been filed, she asks that her actions herein be approved and that she be finally discharged and her bondsman released." This report was recorded in the probate record and constituted a sufficient election to take the life estate in lieu of dower. *Pellizzarro v. Reppert*, 83 Iowa, 497; *Craig v. Conover*, 80 Iowa, 355; *In re Franke's Estate*, 97 Iowa, 704. The claim of estoppel argued by appellees' counsel need not be further considered.

IV. For plaintiffs it is strenuously contended, however, that nothing passed by the fifth and subsequent paragraphs of the will save an option in Philip to purchase the lands at \$45 per acre upon the death of the widow, Elizabeth, and that as he died without exercising this option, before the death

4. SAME: construction: estate devised.

of the widow, this right of purchase did not pass to his representatives or successors, and that, in so far as the real estate is concerned, it became intestate property and passed to the widow and the heirs of the deceased by descent, and not by purchase. The language of the will is peculiar. It says that upon the death of the wife the son Philip *shall have the land at \$45 per acre*, the proceeds to be divided among testator's children, share and share alike. It then specifies what shall be done with William's share—that is to say, it is to remain in the land until all his children become of age, he to receive the interest thereon, and when his children all reach the age of majority he is to be paid \$300 and the remainder divided among his children. Do these provisions create anything more than option in Philip to purchase? They most certainly do, for the proceeds of the sale, to a certain amount per acre, were disposed of and full direction given as to testator's desire with reference thereto. Even were it conceded that Philip had nothing more than an option to purchase, there was nevertheless a disposition of the proceeds of a sale of the land to certain named beneficiaries, a sort of equitable conversion of the real estate into personalty for the benefit of the named devisees or legatees, which a court of chancery, if not a probate court will protect and enforce, although Philip should elect not to purchase or fail for any reason to take the land and pay the purchase price. Philip undoubtedly might have renounced his right to take the land; but this would not have given plaintiffs any title thereto, for the reason that it was undoubtedly charged with a trust to the amount of the named purchase price, if nothing more, for the benefit of the parties named. In so far as plaintiff's case is concerned this thought disposes of it, for they must recover upon the strength of their own title, and not on the weakness of their adversaries'. The original plaintiff, the widow, can take nothing by reason of Philip's failure to elect before his death, for the

reason that under no conditions would she be entitled to any of the proceeds of the land. Again, neither she nor the interveners are claiming any interest under the fifth or any subsequent paragraphs of the will. So much as to plaintiff's case under the will.

V. The trial court in its decree found "that the defendants, by reason of the devise in the will of Conrad Mohn, deceased, to Philip Mohn, now deceased, have a vested interest in the lands (describing them) upon the condition and terms expressed in the fifth paragraph of said will. That the plaintiff, Elizabeth Mohn, transferred to Philip Mohn her use of the property in controversy during her life, in consideration of the yearly payment to her of the sum of \$350. Therefore plaintiff's and intervenor's petitions are dismissed and defendants, as widow and children of Philip Mohn, deceased, are entitled to the use and occupancy of said described land, so long as they pay to Elizabeth Mohn, plaintiff herein, the yearly sum of \$350, and said defendants, upon the death of said Elizabeth Mohn, are entitled to the property in question absolutely upon their paying to the estate of Conrad Mohn, deceased, the sum of \$45 per acre."

Plaintiffs complain of that part of the decree finding that defendants, as representatives or successors of Philip Mohn, have a vested interest in the land subject to a lien or trust in favor of testator's children as indicated in the fifth paragraph; and complain of the finding that Elizabeth Mohn had transferred her life interest to Philip. The widow, as we think, is in no position to complain of that part of the decree giving defendants a vested interest in the estate, for in no event would she be entitled to more than a life estate in the land. Interveners, who are testator's children, may, however, complain of that part of the decree giving defendants a vested estate in property, provided it be found that nothing was given Philip save an option to purchase,

5. SAME: who  
may question  
decree.

which he alone could exercise. In that event doubtless the entire estate, after taking out the life estate to the widow, passed either specifically or in trust to the testator's heirs, share and share alike. What then is the nature of the fifth paragraph of the will which says that after the death of the widow Philip shall have the land at \$45 per acre, the proceeds to be divided among all testator's children, share and share alike?

Of course in one sense it was optional with Philip to take it at the expiration of the life estate. All devises may be said to be optional. *In re Stone's Estate*, 132 Iowa, 140.

6. **SAME:**  
acceptance  
of bequest:  
presumption. In other words, while assent of a devisee to an apparently beneficial devise will be presumed, he may withhold such assent and renounce the provision made for him, and in such case no interest passes to him. A beneficiary is presumed, however, to assent to the provisions made on his behalf, especially where they are beneficial in character.

Now there is no doubt in our minds that testator intended to give his son Philip all the real estate in controversy after the death of his wife, charged with the payment of a certain amount to each of testator's children. The testimony shows that Philip, before his death, accepted this devise in so far as he could do so, and it appears that before he died the devise was a beneficial one, and that the land was worth considerably more than the charges made against it by the testator. The decree passed by the trial court provides that defendants shall have the land upon paying the sum charged into the estate of Conrad Mohn, deceased. The question as to whether they shall have any of it back is not now presented, and defendants are not complaining of the fact that they are required to pay this amount upon the death of the widow, as is indicated in the decree hitherto set out. Plaintiffs are not complaining of the amount ordered paid, but they say that nothing

passed under the will save a personal option to Philip, which did not pass to his successors.

As we have already observed, this is not, in our opinion, the correct version of the matter. Of course a pure option under our holdings does not pass to the optionee's representatives or successors.

7. SAME:  
option to  
purchase.

*Myers v. Stone*, 128 Iowa, 10; *Conn v. Tonner*, 86 Iowa, 577. To this general rule

there are, however, some exceptions under our statute which need not be noted at this time.

It must be remembered that wills are given a little broader construction than contracts and the fundamental tenet of construction, where a will is involved, is to

8. SAME: bequest  
subject to a  
charge upon  
the property:  
passing of  
title.

gather, if possible, testator's intent. This once found will be given force and effect, no matter what the language whereby it is expressed. No such formalities are generally

required as in other instruments of purchase, and, save for a few arbitrary rules, testator's intent, when once discovered, will be carried out. In this case, as will be noticed, there is no gift over in the event Philip should elect not to purchase, and in such cases it is generally held that the devise in such language as appears in the fifth paragraph simply creates a charge upon the land and is not a condition precedent to the passing of title. *Allen v. Allen*, 121 N. C. 328 (28 S. E. 513); *Woods v. Woods*, 55 N. C. 420; *Wyckoff v. Wyckoff*, 49 N. J. Eq. 344 (25 Atl. 963); *Weiler's Estate*, 169 Pa. 66 (32 Atl. 101). See, also, as bearing upon this same subject: *Wise's Estate*, 188 Pa. 258 (41 Atl. 526); *Lefevre's Estate*, 171 Pa. 404 (33 Atl. 363); *Thompson v. Hoop*, 6 Ohio St. 480.

In *Henry v. Griffis*, 89 Iowa, 543, we held that a devise somewhat similar to the one at bar creates a charge upon the land in the hands of the devisee. To the same effect: *Woodward v. Walling*, 31 Iowa, 533. See, also, *Hanes v. Munger*, 40 Ohio St. 493; *Chase v. Warner*,



106 Mich. 695 (64 N. W. 730); *Hunkypillar v. Harrison*, 59 Ark. 453 (27 S. W., 1004); *Gilbert's Appeal*, 85 Pa. 347.

While plaintiff's counsel constantly speak of the fifth paragraph of the will as creating a mere option, and cite authorities which they claim support such view, we think their real contention is that the estate, if any, received by Philip was contingent remainder, or an estate upon condition precedent, performance of which was necessary to the vesting of any estate. None of the cases cited by them treat such language as is here found as a mere option to purchase. Some of them might be cited in support of the proposition that Philip did not take a vested estate, but rather a contingent or conditional one; but the better authorities seem to hold that the estate created by the language used is either a vested remainder subject to a charge upon or trust in the land, or a conditional or contingent remainder, the condition being construed to be a subsequent one not suspending the vesting of the estate. See many of the authorities heretofore cited and particularly *Hanes v. Munger*, 40 Ohio St. 493, and *Woodward v. Walling*, 31 Iowa, 533, *supra*.

Even if the remainder be conditional or contingent upon Philip's paying the sum specified, it is generally held that such an estate may be sold and will also pass to the devisee's successors. *Cummings v. Stearns*,

9. SAME:  
contingent  
remainder.

161 Mass. 506 (37 N. E. 758). A contingent remainder may be devised where the

contingency is one of event, and not of person. *Ingilby v. Amcotts*, 21 Beav. 585; *Collins v. Smith*, 105 Ga. 525 (31 S. E. 449); *Buck v. Lantz*, 49 Md. 439; *Loring v. Arnold*, 15 R. I. 428 (8 Atl. 335); *Clark v. Cox*, 115 N. C. 93 (20 S. E. 176); *Kenyon v. See*, 94 N. Y. 563; *Barnitz v. Casey*, 7 Cranch, 469 (3 L. Ed. 403); *Winslow v. Goodwin*, 7 Mete. (Mass.) 363. Nothing said in *McClain v. Capper*, 98 Iowa, 145, runs counter to these views.

There the contingency was as to person and not as to event. *Hadley v. Stuart*, 62 Iowa, 267, also supports the views heretofore announced.

In so far as the proposition now before us is concerned it may be solved by the single thought that Philip elected to accept the devise before his death, obligating himself and his heirs to pay the charges against the same. *Williams v. Nichol*, 47 Ark. 254, (1 S. W. 243); *Porter v. Jackson*, 95 Ind. 210 ( 48 Am. Rep. 704); *Gilbert v. Taylor*, 148 N. Y. 298 (42 N. E. 713); *Brown v. Knapp*, 79 N. Y. 136; *Case v. Hall*, 52 Ohio St. 24 (38 N. E. 618, 25 L. R. A. 766); *Wyckoff v. Wyckoff*, 48 N. J. Eq. 113 (21 Atl. 287). Under our rule, however, it may be that neither he nor his successors would be bound for anything more than the value of the property. *Pitkin v. Peet*, 87 Iowa, 268. But that point need not now be decided.

VI. The last and only other point in the case is the correctness of the finding of the trial court that defendants are entitled to immediate possession of the land, because

10. SAME:  
purchase of  
life estate;  
statute of  
frauds;  
evidence.

of the claim that Philip Mohn purchased his mother's life estate before his death. This finding is challenged by plaintiffs upon two grounds: First, because the testimony does not sustain the claim; and, second, because

the contract, if one was made, is within the statute of frauds and therefore void. We are constrained to hold that a preponderance of the testimony shows a purchase of the widow's life estate by Philip Mohn before his death, and that he took possession of and made improvements upon the land relying upon his contract of purchase. It was also agreed that Philip should pay his mother the sum of \$350 annually until her death, in consideration of the conveyance of the life estate to him. This amount has been paid and plaintiff, down until the death of Philip, made no claim of title to the land. Something like six witnesses testify to such a contract and while the widow denies it and there

is also other testimony which tends to negative any such agreement, we believe the circumstances point strongly to the fact that such an agreement was made and recognized down to the time of Philip's death. After that John Mohn, Philip's administrator, assumed control of and rented the land and shortly before the commencement of this suit, as we understand it, the widow resumed possession thereof.

As plaintiffs did not plead the statute of frauds or object to the oral testimony offered to sustain the alleged contract, we might, under the doctrine of *Crossen v. White*, 19 Iowa, 111; *Holt v. Brown*, 63 Iowa, 322, and *In re Snyder*, 138 Iowa, 553, and other like cases, refuse to consider that question in its relation to the case. But, passing that point, we think the testimony shows such a change in the possession of the farm and such expenditures made by Philip Mohn during his lifetime on the faith of the contract as takes the oral agreement out of the statute. It will be remembered that the statute does not apply when the vendee has taken and held possession of the property under and by virtue of the contract, or when there is any circumstance which, by the law in force when the statute was passed, would have taken the case out of the statute. Code, section 4622.

Now, the testimony shows that testator and his wife lived upon the farm in question before testator's death; the son Philip living with them and managing the land. After testator's death the widow lived upon the farm; her son living with her and managing the farm, no doubt as a tenant down to near the time of his (Philip's) marriage. In view of that marriage and of the widow's desire to leave the farm and move to town, the contract for the sale of her life estate was entered into. It was then arranged that the widow should leave the farm, that Philip should take and hold possession thereof, his wife becoming his housekeeper in place of his mother, and that he should pay the mother the amount agreed upon. Pursuant to this

agreement Philip took his new wife to the farm and he, Philip, made substantial and valuable improvements thereon and treated it as his own down to the time of his death. Elizabeth immediately moved off the place, took her furniture therefrom, and established a new home at Lisbon. Philip refurnished the house, brought his bride thereto, and made the improvements already indicated. These facts, as it appears to us, bring the case within the exceptions to the statute. Conceding that Philip was in possession as tenant at the time the alleged contract was made, he was, nevertheless, in joint possession with his mother; he was in fact living with her upon the farm. Plaintiff desired to leave the farm and Philip wished to take his new wife thereto. In consequence the contract was made and the changes already indicated occurred in the possession. As Philip's possession after the making of the contract was clearly referable thereto, there was such a taking and holding thereof as brings the case within the exception to the statute. Moreover, in view of the expenditures made by Philip on the strength of the contract and of the payments or obligations made for the land, it would be a fraud upon Philip or his successors to allow plaintiffs to rely upon the statute. *Gregory v. Bowlsby*, 115 Iowa, 327, s. c. 126 Iowa, 588.

The case fairly bristles with propositions of law and fact, and upon some of the former there is a conflict in the authorities. We have gone through it in the light of our former holdings, and where we have no rule already established have announced one which we believe to be correct on principle and sustained by authority, with the result that we find nothing in the decree of the trial court of which plaintiffs may justly complain.

It is therefore in all respects *affirmed*.

L. P. ROSE, Appellant, v. PETER EGGERS.

**Exchange of property: REPLEVIN: RESCISSION: TENDER.** In an equitable action to recover property given in exchange for other property a tender in the petition of a return of the property received is timely, and the commencement of the action is a sufficiently definite disaffirmance of the contract of exchange and election to rescind; but in a law action the plaintiff's right of recovery must have been perfect in this respect when the action was begun.

**Same: WAIVER OF TENDER.** On the rescission of a contract of exchange of property a formal tender of the property received by plaintiff may be waived; and to constitute such waiver it is only necessary to show that if the tender had been made it would have been unavailing. And where the defendant refused to take back the property, not however on the ground that plaintiff had incumbered it, it was not essential for plaintiff to make a new tender after relieving it of the incumbrance and before instituting his action.

**Same: WAIVER OF TENDER: SUBMISSION OF ISSUE.** Where a party undertakes to rescind a contract for the exchange of property and has no claim to the property received except by virtue of the contract, an offer to return the property received unless waived is a condition precedent to the right to maintain the action.

**Same: EXCHANGE OF PROPERTY: FRAUD: RESCISSION.** A contract for the exchange of personal property induced by fraud is voidable only, and the injured party may affirm it and sue for damages or he may disaffirm it and demand a return of the property with which he has been wrongfully induced to part, but if he elects to rescind he must return the property received.

**Same: FORMER ADJUDICATION: EXCLUSION OF EVIDENCE: PREJUDICIAL ERROR.** Plaintiff and defendant in this action exchanged horses and plaintiff sought to rescind the contract on the ground of fraud and brought replevin to recover the horse he transferred to the defendant. One of the grounds of rescission was that defendant did not own the horse traded to plaintiff at the time of the exchange. Defendant pleaded an adjudication in a replevin suit brought by a third person against plaintiff to recover possession of the horse in which plaintiff was successful, and no reply was filed to this answer. All evidence which tended to show that de-

fendant was not the owner of the horse was excluded because of the adjudication in the former suit. *Held*, that the question of whether there was an adjudication such as pleaded was in issue and the court should not have assumed an adjudication and excluded the evidence; and this error was not cured by the concession of counsel for plaintiff that in the former suit the third person claimed the horse under an alleged purchase from the person from whom defendant derived title, and that plaintiff held title, if any, under defendant, where it appeared that no pleading was filed by defendant in the former action and the plaintiff in that action was not present at the trial.

*Appeal from Crawford District Court.*—HON. Z. A. CHURCH, Judge.

SATURDAY, JULY 9, 1910.

ACTION in replevin resulted in a directed verdict for defendant and judgment thereon. The plaintiff appeals.—*Reversed.*

*Harding & Kahler*, for appellant.

*R. Shaw Van and Conner & Lally*, for appellee.

LADD, J.—The parties hereto exchanged stallions about February 20, 1906, that of plaintiff being a Goldenberry coach, named "General;" the defendant's, a percheron, known as "Bedford." They traded even, but subsequently plaintiff rued his bargain and brought this action to recover the possession of "General." After the introduction of the evidence, the jury was directed to return a verdict for the defendant, and the main question for our consideration is whether this was warranted by the record. The plaintiff alleged in the petition that he was induced to make the trade by defendant fraudulently representing that he was the owner of the stallion "Bedford" when he was not; that said stallion was sound when he was blind; that he

was a sure foal-getter when he was not such. This was denied by defendant who claimed damages for the wrongful detention of the coach horse. On the trial plaintiff testified that he had informed defendant that his eyesight was poor, and he would have to rely on him as to the soundness of his horse, and that defendant responded that the horse was all right in every respect and a good foal-getter. But the defendant testified his antagonist boasted of his ability as a horse trader; examined the stallion for himself, that no mention was made of condition and that to an inquiry whether the stallion was a sure foal-getter, he had responded that he had been pretty fair before, and they would drive over the stand and look at the mares bred and talk with their owners, and that afterwards plaintiff became satisfied.

Other evidence tended to show that "Bedford" was nearly or quite blind, and that this was known to defendant, and that with intent to deceive he represented otherwise and thereby induced plaintiff to exchange "General," of the agreed value of \$1,250, even up for "Bedford," a horse the jury might have found unfit for breeding purposes and not worth to exceed \$100. Indeed, this was the price defendant claims to have paid one Ayres for the animal shortly before. The plaintiff did not discover the condition of "Bedford" until March 19, 1906, when one Philpott demanded the horse, claiming to have purchased it of Ayres at the price of \$100, and that it was blind. The two met defendant the next day and according to plaintiff's testimony he then told defendant that he wanted the coach horse back and would return the percheron, to which defendant replied: "I have nothing to do with that horse; he was my horse when I traded to you and he is your horse now, and Mr. Philpott has nothing to do with him, has no right to get him. You can't bring that horse back to my place. I don't want him. I traded him to you and he is your horse and you keep him. I forbid

you ever bringing that gray horse on my place. I don't want to forbid you from coming on my place, but I do forbid you from bringing the gray horse on my place." This was denied by the defendant who testified to offering a trade back. "Bedford" was then in plaintiff's possession, and if this was said by defendant no farther tender was essential. It appears however that subsequently Philpott instituted a suit in replevin in justice court, and on March 23d plaintiff caused to be served on defendant a written tender of the horse, subject to said replevin suit, and notifying him that he relinquished all claim to the horse to him and specified when, where and before whom said suit would come on for trial. Evidence was adduced tending to show that the replevin suit was collusive, but this was not necessarily the conclusion to be drawn therefrom. At the trial, the justice entered judgment, awarding possession of the horse to plaintiff, though Philpott had shipped him to his home in Taylor county, where he died some time prior to the trial. The defendant testified to having offered to trade back on the day of each of the tenders alleged, but this was denied by plaintiff.

The jury, then, might have found any tender essential to a rescission was waived in the conversation of March 20th, and that the written tender was sufficient, provided the situation was such that had there been an acceptance the plaintiff could have delivered him the horse. But two obstacles are said to have been in the way, a chattel mortgage on the horse and the replevin proceedings. After the trade plaintiff had executed a mortgage on the stallion "Bedford" to secure the payment of \$530.94 to W. C. Hess. Before seeing defendant in the morning of March 20th, plaintiff arranged with Hess to satisfy this mortgage and accept other security in lieu thereof. This arrangement, however, was not carried out until April 6th following, when a satisfaction piece was executed and this action for the recovery of "General" instituted on the same



day. From this recital of the record, it is apparent that the evidence was sufficient to carry the issues on the merits to the jury, and the only questions involved on this appeal are whether plaintiff was in a situation to rescind and had taken the steps essential to effect rescission..

Had the suit been in equity, a tender of the return of the property in the petition would have been timely, and the commencement of the action for the possession of the stallion exchanged a sufficiently definite disaffirmance of the contract and the election to rescind. *McCorkell v. Karhoff*, 90 Iowa, 545; *Olson v. Brison*, 129 Iowa, 604. But in a law action the plaintiff's right of recovery must have been perfect when begun. The chattel mortgage had then been satisfied. Though Philpott had the horse "Bedford" in his possession, a judgment in the justice court had declared plaintiff entitled thereto and for all that appears he might have enforced this judgment by process at any time. The plaintiff then was in a situation to restore the property received when the action was begun, or at any time thereafter until the stallion died. That defendant was advised of plaintiff's election to rescind conclusively appears, but it is argued that the tender of the return of the property was ineffective in that (1) it was incumbered; (2) was involved in the replevin suit in the justice court; and (3) there was not an actual tender.

That a formal tender of property when exacted by law may be waived is too well settled to require the citation of authority. To constitute such a waiver all necessary to be shown is that had the tender been made it would have been unavailing. The law never exacts anything as a mere matter of form or idle ceremony. If, as the jury might have found, defendant, after being advised of plaintiff's election to rescind, forbade him to return the stallion or to bring

1. EXCHANGE OF  
PROPERTY:  
replevin:  
rescission:  
tender.

2. SAME:  
waiver of  
tender.

him on his place to have offered to do so would have been idle and unnecessary. As will be observed by reference to the testimony quoted, the alleged refusal to take the horse back was not on the ground that he was incumbered, and for this reason, upon the satisfaction of the mortgage, it was not essential to make a tender of the horse anew before instituting the action.

In *Olson v. Brison*, 129 Iowa, 604, an admission in the course of the trial that the property would not have been taken had it been brought back was held enough to obviate the necessity of a tender having been made. Much of the argument of counsel is devoted directly to the question of whether a party, who has fraudulently procured the execution of a contract, is entitled to an offer of restoration as a condition precedent to rescission. That a tender is unnecessary where the party undertaking to rescind is entitled to retain the money or property received, even though the contract be set aside, appears from *Howard v. McMillen*, 101 Iowa, 453, and *Dillon v. Lee*, 110 Iowa, 156. See *O'Brien v. Railway*, 89 Iowa, 644.

But where the party undertaking to rescind has received money or property under the terms of the agreement sought to be avoided, to which he has no claim other than by virtue of the contract, the rule is of universal application that an offer to return, unless the necessity therefor has been obviated by conduct of the other party constituting a waiver, is essential as a condition precedent to the maintenance of an action at law for the recovery of property alleged to have been fraudulently procured. Bishop on Contracts, section 679; Beach on Modern Law of Contracts, 792; *Perley v. Balch*, 23 Pick. (Mass.) 283 (34 Am. Dec. 56); *Sheldon Axle Co. v. Scofield*, 85 Mich. 177 (48 N. W. 511); *Masson v. Bovet*, 1 Denio (N. Y.) 69 (43 Am. Dec. 651); *Balue v. Taylor*, 136 Ind. 368 (36 N. E. 269).

Such a contract is voidable only. The injured party

3. SAME: waiver  
of tender:  
submission  
of issue.

may confirm it and sue for damages if he chooses, or he may disaffirm it in which event fraud destroys the contract *ab initio*, and no reason can be assigned for permitting the party undertaking rescission to retain the property received and at the same time demand the return of that with which he had been wrongfully induced to part. In *Hendrickson v. Hendrickson*, 51 Iowa, 68, on which appellant relies, the instruction, the refusal to give which was held to be reversible error, was asked by the alleged wrongdoer, and, as explained in *Citizens' Bank v. Barnes & Sons*, 70 Iowa, 412, the ruling was on the ground that he was entitled to as much as he had requested at least; the court being content not to say whether he was entitled to something better. The case is again referred to in *National Imp. & Const. Co. v. Maiken*, 103 Iowa, 118, as announcing an exception to the general rule exacting an offer to return, evidently without having noticed the explanation in the later decision, but this was dicta and in no wise essential to the determination of the question under discussion. An offer to restore the stallion, unless waived, was essential as a condition precedent to the maintenance of the action, and whether there was such waiver was put in issue by the evidence. The court erred in not submitting the cause to the jury.

II. One of the grounds of rescission alleged in the petition was that defendant did not own "Bedford" at the time of the trade. An adjudication in the replevin suit of this issue was pleaded in the answer. No reply was filed. On objection all evidence tended to show that defendant was not such owner was excluded, because of the adjudication pleaded. This was manifest error for whether there was an adjudication such as pleaded was in issue, and until that had been settled the court ought not to have assumed there to have been an adjudication. But counsel

4. SAME: exchange of property: fraud: rescission.

5. SAME: former adjudication: exclusion of evidence: prejudicial error.

for plaintiff, in response to questions from the bench, in effect conceded that in the replevin suit Philpott claimed the horse under an alleged purchase of one Ayres, and that plaintiff held title, if any he had, under defendant, who also claimed to have purchased from Ayres. But no pleading was filed by the defendant therein, and Philpott was not present at the trial. For all that appears, the horse may have been ordered to be returned owing to Philpott's omission to introduce any evidence of ownership, and, if so, there was no adjudication bearing on the title plaintiff (defendant therein) may have acquired in the trade with defendant. The error in the rulings on the admissibility of evidence, then, was not obviated by the admissions of counsel or subsequent proof. It will be time enough to say whether the plea was good when that question is presented by the record.

Other questions argued are not likely to arise on another trial. *Reversed.*

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M. E. SHIELDS, Appellant, v. RICHARD COYNE.

**Principal and agent: CONTRACT BY AGENT: UNDISCLOSED PRINCIPAL:**

- 1 EVIDENCE. One who sues as an undisclosed principal on a contract purporting to have been made by his agent in the agent's name has the burden of proving the agency, and that in making the contract the agent was acting for him. In this case a wife brought suit for breach of a contract made by her husband with defendant, and the evidence is held insufficient to show that the husband was acting for plaintiff in the transaction as an undisclosed principal.

**Same: RIGHTS AND LIABILITIES OF UNDISCLOSED PRINCIPAL.** Ordinarily

- 2 an undisclosed principal may sue and be sued for the breach of a contract made by an agent for his benefit but in the agent's name; yet if the party contracting with the agent without knowledge of the agency does so because of some personal trust or confidence in the agent, and the contract remains executory, the undisclosed principal can not enforce the agreement in his own name.

*Appeal from Shelby District Court.*—HON. O. D. WHEELER, Judge.

SATURDAY, JULY 9, 1910.

ACTION to recover damages for a breach of a contract for the loaning of money by defendant to plaintiff, represented in the transaction by her husband, Patrick Shields. At the close of plaintiff's evidence the court sustained a motion for defendant to direct a verdict in his favor, and from judgment on such directed verdict, the plaintiff appeals. *Affirmed.*

*T. E. Brady and Cullison & Cullison*, for appellant.

*Byers, Lockwood & Byers*, for appellee.

MCCLAINE, J.—The evidence tends to show an oral agreement between the defendant and Patrick Shields, the husband of plaintiff, by which, on certain contingencies not here material to mention, the defendant agreed to loan to said Patrick Shields \$9,600 at five and one-half percent interest for five years to enable the latter to purchase a piece of land, and that subsequently when the conditions had been complied with the defendant refused to advance the money in accordance with the agreement, rendering it necessary for this plaintiff, who alleges that the agreement was made for her and in her behalf, to borrow the money elsewhere at six percent. Plaintiff seeks to recover, by way of damages for breach of the contract, the difference in the interest which she was compelled to pay. It is not claimed that plaintiff's husband purported in the negotiations to be acting for his wife or for any person other than himself, or that defendant knew or had any reason to suppose that plaintiff's husband was making the

1. PRINCIPAL  
AND AGENT:  
contract by  
agent: undis-  
closed princi-  
pal: evidence.

contract as the agent of another. Indeed, we are unable to discover in the brief record presented to us any evidence of an arrangement or understanding between plaintiff and her husband that her husband was to act in her behalf in procuring the loan from defendant. This is a very material matter, for without some such arrangement or understanding between plaintiff and her husband, the contract would not be binding on the plaintiff, and therefore, as between her and defendant, there would be no mutuality. It does appear that the plaintiff, during the time these negotiations between her husband and defendant were pending, was carrying on a farm in her own name, and that all the marketing, buying, and selling was done by him for her. But we think that this evidence falls far short of constituting any proof that, even as between plaintiff and her husband, it was understood that the proposed loan was being procured by plaintiff's husband for her, as undisclosed principal.

Under this state of facts it is very clear that plaintiff can not maintain an action for the breach of this contract: First, because plaintiff's allegation that she entered into such contract through her husband as her agent, which allegation is covered by defendant's general denial, was not proven; and second, because, if proven, the contract would not be binding as between her and the defendant who had no knowledge that her husband was acting as her agent in the matter. One who sues as undisclosed principal on a contract purporting to have been made by his agent in the agent's own name has the burden of proving the fact of agency, and that in the making of a contract the alleged agent was acting for him. *Powell v. Wade*, 109 Ala. 95 (19 South. 500, 55 Am. St. Rep. 915).

While the first of these reasons appears to us to be conclusive of the case, the argument of counsel relates to the second proposition, and we shall briefly express our views as to appellant's contentions. It is true that if

one, as agent and acting for another, make a contract in his own name for the benefit of his undisclosed principal, the principal may be sued for breach of such contract, and on the other hand may recover damages for breach thereof

2. SAME:  
rights and  
liabilities of  
undisclosed  
principal.

by the other party. But this general rule is subject to well-recognized exceptions, one of which is that if the party contracting with the agent having no knowledge of the agency may reasonably be supposed to have entered into such contract in consideration of some element of personal trust and confidence, and the contract remains wholly executory, the undisclosed principal can not enforce the contract in his own name and right. This exception is based on the very good reason that a contracting party is not bound to accept performance of personal services from or extend confidence or credit to another person than the one with whom he supposed he was entering into the contract relation. *Mechem, Agency*, sections 769-771; *Birmingham Matinee Club v. McCarty*, 152 Ala. 571, (44 South. 642, 13 L. R. A. (N. S.) 156), 15 Am. & Eng. Ann. Cas. 237, and notes; *Kelly v. Thuey*, 102 Mo. 522 (15 S. W. 62); *King v. Batterson*, 13 R. I. 117 (43 Am. Rep. 13); *Barns v. Barrow*, 61 N. Y. 39 (19 Am. Rep. 247); *Cowan v. Curran*, 216 Ill. 598 (75 N. E. 322); *New York Brokerage Co. v. Wharton*, 143 Iowa, 61; *Ellsworth v. Randall*, 78 Iowa, 141.

The facts of this case bring it clearly within the exception to the rule that the undisclosed principal may sue for breach of contract made by his agent. There is no evidence that Patrick Shields agreed to secure the payment of the money to be loaned by a mortgage of the land which as he represented he proposed to purchase, and even if it appeared that the loan was to be thus secured, there is no evidence that the defendant relied entirely upon such security, and not to any extent upon the personal responsibility of Patrick Shields. It is clear that he was under

no obligation therefore to make the loan to plaintiff, and if he were under no such obligation, he is not liable for damages to plaintiff for refusing to make it. If the contract was by Patrick Shields as agent for plaintiff, it could only be carried out by the loan of the money to plaintiff, and plaintiff can not recover damages if the contract was only for the loan of money to her husband.

The cases relied upon for appellant are not in point. In *Winchester v. Howard*, 97 Mass. 303 (93 Am. Dec. 93), it is said that an agent may sell the property of his principal without disclosing the fact of his agency, or that the property is not his own, and the principal may maintain an action in his own name to recover the price. But the court follows this general proposition with the statement that, on the other hand, every man has a right to elect what parties he will deal with, and to take into account in such dealing the character, credit, and substance of the person with whom he contracts. And in *Kelly v. Thuey*, 143 Mo. 422 (45 S. W. 300), the court, commenting upon the case of the same title above cited, simply holds that an agent may enter into a contract for the purchase of land for an undisclosed principal, and the principal may maintain suit in his own name and enforce the contract; but it is not indicated that any credit was extended or was to be extended to the agent as supposed principal in the transaction.

The reasons assigned by the defendant for refusing to carry out the contract with plaintiff's husband were wholly immaterial. If he incurred no obligation to this plaintiff, then his reasons for not carrying out his contract with her husband, even though not sufficient to justify him as against the husband, would not give rise to any right of action in favor of the plaintiff.

The judgment was correct, and it is *affirmed*.



**MORGAN & WRIGHT, Appellants, v. SUTLIVE BROS.,  
Appellees.**

**Contracts: CORRESPONDENCE: EVIDENCE.** In this action for the price  
1 of goods manufactured for defendant the correspondence of the  
parties is held to constitute a binding contract.

**Same: SUBMISSION OF ISSUE.** Where the whole contract for the  
2 manufacture of goods was embodied in the correspondence be-  
tween the parties, as in this case, and was that plaintiff should  
give defendants' orders for goods their best attention, it was  
error for the court to submit to the jury the question of what  
plaintiff agreed to do, in an action by them for the price of goods  
delivered.

**Sales: BREACH OF CONTRACT: RECOVERY UPON COUNTERCLAIM: INSTRU-**  
3 **CTION.** Where plaintiffs' contract for the manufacture of goods  
was embodied in the correspondence of the parties, which conclu-  
sively showed that plaintiff was simply to give defendants' orders  
their best attention, an allowance by the jury upon defendants'  
counterclaim for delay in delivery was unauthorized, in the ab-  
sence of any evidence of a breach of the contract, and was a  
violation of an instruction that to recover upon the counterclaim  
defendant must show by a preponderance of the evidence that  
plaintiffs failed to comply with their agreement.

**Same: SUBMISSION OF ISSUES: UNDISPUTED EVIDENCE.** Where but one  
4 finding on a question of fact is possible under the evidence the  
issue should not be submitted to the jury. Thus where defendant  
in an action for the price of manufactured goods counterclaimed  
for delay in delivery, and the correspondence between the parties  
showed conclusively that defendant had canceled his order and  
that plaintiff had assented thereto, it was error to submit the  
question of cancellation.

**Same: DAMAGES: LOSS OF PROFITS: EVIDENCE.** Loss of profits as an  
5 element of damage are not to be rejected in all cases as neces-  
sarily uncertain and speculative; but where they are clearly un-  
certain, speculative, and not reasonably within the expectation of  
the parties, they can not be considered because incapable of ade-  
quate proof. In this action for the price of manufactured goods  
in which defendant counterclaimed for delay in delivery, the evi-

dence is held to show that defendant's claim for loss of profits which would have accrued had the goods been promptly delivered was too unreasonable and uncertain to constitute an element of damage, and that the same was not contemplated by the parties as an element of damage resulting from the delay.

**Same.** The acceptance by a buyer of a delayed shipment of goods is not necessarily inconsistent with a claim for damages caused by such delay, but is inconsistent with a claim for damages for complete loss of profits upon all the goods ordered.

**Same: BREACH OF CONTRACT: WAIVER OF DAMAGES.** Where a buyer of manufactured goods to be shipped in installments requests a cancellation of his contract and all outstanding orders, which is assented to by the manufacturer, and in response to a statement of the balance due from him forwards his check in settlement he waives any claim for damages growing out of delay in delivery of the goods, and can not plead such damages as a counterclaim in a suit for the price of goods subsequently ordered and received.

*Appeal from Keokuk Superior Court.*—HON. W. L. MC-NAMARA, Judge.

TUESDAY, APRIL 12, 1910.

PLAINTIFFS brought this action on account for goods sold and delivered to the extent of \$107. The account was admitted by the defendants and a counterclaim for \$8,000 was set up as alleged damages for breach of contract. There was a general verdict for the defendants for \$3,000, and judgment was entered thereon. Plaintiffs appeal. *Reversed and remanded.*

*Hollingsworth & Blood*, for appellants.

*F. T. Hughes* and *W. J. Roberts*, for appellees.

EVANS, J.—The negotiations and transactions involved in this suit began in October, 1900, and ended in January, 1903. The plaintiffs were manufacturers of rubber goods.

The defendant B. E. Sutlive was doing business under the name of Sutlive Bros., purporting to consist of himself and two brothers. The brothers deny all interest in the purported firm, and in our discussion of the case B. E. Sutlive will be referred to as the defendant. The defendant had been engaged for some time in selling a certain device known as a pillow ventilator. It was a spool-shaped device, which was inserted in the covering of the pillow in such a way that the feathers therein should be ventilated by the passage of air through the opening in the spool. This device is referred to in the correspondence between the parties as a rubber spool. These spools were manufactured for the defendant by the plaintiffs, and they constituted the first stage in the completed device. After the spool was received from the plaintiffs, certain further labor was bestowed upon it by the defendant to prepare it as a completed device for the market, and this consisted principally in covering the opening thereof with a web so constructed as to permit the passage of air and prevent the escape of the pillow feathers. The parties had been dealing together for some years prior to the transactions involved in this case.

On October 30, 1900, the defendant wrote to the plaintiffs proposing to order 1,000,000 spools at \$2.85 per thousand, one half of which should be delivered in 1901 as follows: January 1, 1901, 75,000, March 1, 1901, 75,000, May 1, 1901, 75,000, July 1, 1901, 75,000, September 1, 1901, 75,000, November 1, 1901, 75,000, December 1, 1901, 50,000, and the other one half to be delivered in the same manner in the year 1902, subject to the right of countermand by the defendant. On November 1st the plaintiffs replied to this letter by declining the proposition. Their letter, however, contained the following: "We will accept your order for 500,000 spools to be delivered as you specify during the year 1901 at a price of \$2.85 per thousand, but under no circumstances could

we make a better price." To this letter, the defendant, on November 2, 1900, replied as follows: "Your letter of the 1st at hand and you may enter our order for 500,000 rubber spools at \$2.85 per thousand to be delivered during the year 1901. Please send balance of old order as fast as you can." This order was repeated on November 3d, and its receipt was acknowledged by the plaintiff under date of November 7th. Pursuant to this order plaintiffs shipped to the defendant during the year 1901 a total of 359,275. The rate of delivery was in substantial compliance with the contract up to the last of August, 1901, except that no shipment was made in March, and only 15,529 were shipped in April. Nearly 78,000 were shipped in January and February, and more than 75,000 were shipped every sixty days during May and June, July and August. Some complaints were made by the defendant during the summer months because of shortage in receipts, but the defendant himself was usually in arrears in payment for the goods actually received when such complaints were made. On September 9, 1901, while such arrears of payment continued, the defendant wrote to plaintiffs as follows: "We received your statement, and anticipating draft may follow in a few days, would ask that you kindly give us chance to remit about the 15th or 20th inst. The few days would enable us to make better connection, and thanking you in advance for the favor, we remain." Again on October 11, 1901, he wrote as follows: "Replying to your letter just to hand, we will wait until the 20th of the month again to remit, if this will be satisfactory to you. If our remittances are not coming fast enough, it might be well to allow a little longer time between shipments for a month or so. Our advertising season is now on and we can use the cash a good deal faster than the goods. We hope this will be satisfactory, and remain."

The deliveries for September, October, November, and  
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December were 113,627 instead of 300,000 as specified in defendant's original proposition. The deliveries, however, continued after the close of the year 1901 by the mutual acquiescence of the parties. On February 7, 1902, the defendant wrote to the plaintiffs as follows: "You knocked us out when you quoted the rubber spools at \$2.85. We have tried hard to build up a trade on this article by advertising it, but such a thing as a 'demand' is, in our opinion, an impossibility. The advertising must keep up or the orders stop short. We didn't make a dollar on it last year. If we advertise further, we must get concessions from the newspapers on the basis of larger orders for advertising, and must then handle the metal spool, or get the rubber article cheaper. You once made them for us at \$2.70. We are now trying to get one million for \$2.50 per thousand and would take 100,000 every sixty days. If we do not succeed, the stock on hand of rubber and metal, together with those coming to us from order now in your hands, will do us indefinitely. You have been accommodating to us, for which we thank you." The deliveries by plaintiffs from January 1, to May 1, 1902, aggregated nearly 75,000. During this period, some correspondence passed between the parties looking to a new order. The material part of this correspondence was that the defendant proposed a lower price, which proposition was declined by the plaintiffs. On May 1, 1902, the defendant wrote to the plaintiffs as follows: "We inclose check for \$99.75, as per invoice March 10th. Your price of \$2.85 on a new lot of these goods is a little higher than we would have to pay, but it is an accommodation to us to get the spools at the same rate of delivery as last order, and you may enter our order for another five hundred thousand at \$2.85 per thousand, price and other condition being the same as on the former five hundred thousand. We have about 125,000 yet on hands, but you can ship right along just the same until order is completed. We

shall expect the new lot to be like those you have shipped the last two or three times, and this condition is included in our order." To this letter no response was made by plaintiffs until a second letter calling attention thereto was written by the defendant to the plaintiffs on May 12th. Thereupon, on May 13, 1902, plaintiffs replied as follows: "Sutlive Bros., Keokuk, Iowa. Gentlemen: We duly received your favor of the 12th inst., and now beg to acknowledge receipt of your valued order and remittance of \$99.75 under the date of the 1st. We appreciate your kind favors and your order shall have our best attention. Our failure to acknowledge your favor was simply an oversight, which, you know, will occur occasionally in the rush of business. Again thanking you, we remain, with best wishes. Yours very truly, Morgan & Wright."

After May 1, 1902, 152,000 were delivered by plaintiffs. On November 1st a strike of laborers went into effect, and the plaintiffs' factory was closed and picketed, and so continued to the end of the year. On December 19, 1902, the defendant wrote the plaintiffs as follows: "Dear Sirs: We inclose check for \$85.45 in payment of the items enumerated in inclosed statement. In a recent letter you advise us your draft for this amount was returned to you, but if so it was returned by the 'candy side' of our business—we did not see your draft. We did not expect to be drawn on, either, in view of the fact that your failure to ship us goods has cut off our source of revenue. This branch of our business is obliged to pay all its own bills, and the strike has cost us in delays, several hundreds of dollars. As we are afraid we can not use the 500,000 spools ordered about May 1st, last, you may cancel our order, and if we 'recuperate' we may place another order with you. If you could manage to ship our molds at once to the B. F. Goodrich Company, Akron, Ohio, you would oblige us. They have made us a price on 30,000 spools. If you could make the 30,000 spools

at once, you could enter our order for this number at \$2.85 per thousand, but please cancel our order for 500,000. Yours very truly, Sutlive Bros." This cancellation of the order was assented to by plaintiffs under date of December 23d. The defendant bases his claim of breach of contract and damages therefor upon the delays in delivery. He claims that the plaintiffs were in arrears in delivery to the amount of 140,000 for the year 1901, and to the amount of 150,000 for the year 1902 up to the date of the cancellation of the order. His claim, in brief, is that if he had received the full amount of his order on the specified dates, he could have sold the same at a profit of \$16 per thousand, and this is the alleged basis and measure of his damages. On this basis he counterclaimed for \$8,000 damages, and recovered a verdict for \$3,000. The foregoing statement will suffice for the moment to enable us to consider some of the instructions which are complained of by appellant.

I. There is considerable argument on the question whether the correspondence set forth constituted contracts between the parties. The trial court instructed the jury that the correspondence had, in the fall of 1900, amounted to a contract for the manufacture and delivery of 500,000 spools on the dates specified in the defendant's original proposition. We think this holding was correct. Appellant complains because the court ignored a certain letter of November 7th from the plaintiffs to the defendant, wherein they acknowledged the receipt of his order, and stated therein that the same "is having our best attention." This letter does not purport to qualify the contract in any way. In this case the plaintiffs themselves had made the offer in their letter of November 1st, and the defendant's letter of November 2d was an unqualified acceptance, and this was sufficient to complete the contract.

1. CONTRACTS: correspondence: evidence.

As to the second contract, the court instructed the

jury by instruction No. 5 as follows: "If from the evidence under the instructions of the court the jury finds that all the plaintiffs, Morgan & Wright, agreed to do in connection with the alleged so-called second contract which it is claimed was made by the correspondence between the plaintiffs and defendant from January 24, 1902, to May 1, 1902, inclusive, was to give the orders of Sutlive Bros., under same their best attention, then it is incumbent upon the defendant, Sutlive Bros., to show by a preponderance of the evidence that the plaintiffs did not give the said order their best attention; and, unless you so find, your verdict must be for the plaintiffs as to this portion of the said counterclaim." The court was not justified in permitting the jury to determine what it was that "Morgan & Wright agreed to do in connection with the alleged so-called second contract." The whole contract was contained in the correspondence above set forth, and the trial court should have instructed the jury as to the effect of it.

In this second contract the undertaking of the plaintiffs was to give the order of the defendant "their best attention." There was no room for any other finding, either by court or jury. If the jury had followed this instruction, it must have eliminated defendant's claim for damages under the second contract, because there was no evidence to show that the plaintiffs had not complied with their undertaking in that respect. The verdict rendered was therefore in clear conflict with this instruction.

There is some question of dispute as to the dates of delivery involved in the second contract. The correspondence provided generally that other conditions should be the same as the former order. This provision, however, could not literally be carried out. The former order provided for deliveries on January 1st, March 1st, and May 1st,

2. SAME:  
submission  
of issue.

3. SALES:  
breach of  
contract: re-  
covery upon  
counterclaim:  
instruction.



and these dates had already gone by before the order was accepted by the plaintiffs. It might be construed to apply to the subsequent dates of the former order such as July 1st, September 1st, November 1st, etc. A delivery of 150,000 would answer the call for July 1st and September 1st. The subsequent correspondence, however, between the parties contemplated that deliveries under the new order should not commence until after the deliveries under the 1901 contract should be completed. The defendant treated the deliveries made in 1902 as having been made under the 1901 contract. After the letter of February 7, 1902, and before the strike, the defendant did not at any time complain of delay in shipment, nor was he at any time free from arrears in payment. But he did, however, write letters requesting shipment under the following dates: August 1st, September 11, September 25, and October 22, 1902, and substantial shipments were made in each case in response to such request.

II. The court gave the jury the following instruction No. 4: "If from the evidence under the instructions of the court the jury finds that the defendant Sutlive Bros., on or about December 19, 1902, requested the plaintiffs, Morgan & Wright, to cancel the said so-called second contract, and if you find that the plaintiffs acquiesced in said request and canceled said contract, then, if you so find, plaintiffs, Morgan & Wright, were under no obligations to furnish further spools under said contract, and plaintiffs can not recover for any failure to deliver spools after the cancellation of said contract." There was manifest error in the giving of this instruction. The request of defendant for a cancellation of the contract was contained in his letter of December 19, 1902, and the plaintiffs' assent thereto was contained in their letter of December 23d. Both letters were clear and unequivocal in this

4. SAME:  
submission  
of issues:  
undisputed  
evidence.

respect, and had the undoubted effect to cancel the order, and the jury should have been so instructed.

The defendant's counterclaim claimed for an alleged failure of delivery of 492,000 spools, and this was the claim submitted to the jury in the statement of issues by the court. The theory of the defendant at this point was that all the deliveries that had been made after May 1st were first applied upon the former contract, leaving 8,000 to be applied upon the second contract. Not only had the plaintiffs delivered over 152,000 after May 1st, but they had delivered also nearly 75,000 between January 1, 1902, and May 1, 1902, before the second contract was entered into. In his theory of the case the defendant quite ignored the delivery of the 75,000 after January 1st and before May 1st, because his damages were alleged to have accrued by the delay previous to such delivery. Under this method of computation urged by the defendant the plaintiffs were in default in delivery to the amount of 492,000. This theory on the part of the defendant took no account of the cancellation of the order. It is true that defendant's counsel do not in this court claim on that theory. Their argument here is based upon the theory that there was shortage of 140,000 under the first contract and of 150,000 under the second. Clearly the jury should have been instructed that the second contract was canceled in December, 1902, by the correspondence referred to.

III. On the question of the measure of damages the trial court instructed the jury that the defendant could not recover for loss of profits unless they should find that "such loss of profits was fairly contemplated by both parties as a probable result or consequence of the failure of the plaintiffs to deliver said spools at the time and in the quantities named in said contract, and that such contract was entered into in contemplation of such consequences following a breach thereof." The implication of this instruction was

5. SALES: dam-  
ages: loss of  
profits:  
evidence.

that, if the affirmative of the foregoing proposition was proved, then such loss of profits was the measure of damages. Except such implication, no other rule of measure of damages was stated. The jury was told to "take into consideration all the evidence relating to the price at which the goods were to be furnished and the prices at which the same were to be resold, and what it would cost to handle and sell such spools as disclosed by the evidence," and also that "any profits which you may allow as damages must be shown by the evidence to be reasonable and certain. Uncertain and speculative profits which might possibly have been made from the sale of feather ventilators manufactured from spools, if any, which you may find from the evidence should have been, but were not, delivered by the plaintiffs to the defendant, can not be considered by you as damages." The only testimony on the question of loss of profits was that of the defendant himself. After testifying that he had sold in the year 1901 about 320,000, the following testimony was received over abundant objection to each question and answer:

Q. 43. State if you had received 500,000 during the aforesaid year from January, 1901, to January, 1902, in lots of 75,000 every sixty days, you could have sold that many in your territory. A. I certainly could have sold the goods if I had gotten them. Q. 44. State how many you could have sold during that year had you received them in lots of 75,000 the 1st day of January, 1901, and 75,000 on the first day of every other alternate second month thereafter in 1901. A. I could have sold at least 500,000 ventilators during the year 1901. Q. State if you had received 180,000 more, could you have sold them also? A. Yes; I could. Q. State what your profits would have been on the 180,000 that you did not receive or sell, if you had received them and sold them. A. The profit would have been \$16 per thousand on 180,000 that I did not receive. Q. If you had received during the period from May 1, 1902, to December 31, 1902, 300,000 spools, state whether or not could have sold all of them. A. I could

have sold all of them. Q. You say that you received 152,398 spools in that year, if you had received 148,000 more during that period, state whether or not you could have sold them. A. I certainly could have sold them. Q. State what your profits would have been on the 180,000 which you say you could have sold, had you received them and sold them. A. My profit on the 148,000 more, if I had received them, would have been \$16 per thousand. Q. State whether or not if you had received them in those quantities and at those times you could have sold the 148,000. A. I could have sold them.

We will not deal now with the technical accuracy of the instructions at this point. It is sufficient for our present consideration that, if these instructions had been followed, the defendant could not have recovered. And if but one finding was possible at this point, then the court should have made it, and should not have submitted it to the jury as an open question at all. The price to be paid the plaintiffs was \$2.85 per thousand. The claim of the defendant is that, after incurring certain additional expense thereto, he could have sold them all at a profit of \$16 per thousand. This is an alleged profit at something over 500 percent above the price to be paid the plaintiff. Can it be said upon this record that such profit was "reasonable" and "certain," and "within the contemplation of the parties?" Such alleged profit was not to be made upon a resale of the goods as received from the plaintiffs, but upon the goods as they would be after further labor and expense had been incurred thereon. Granted that ordinarily the question of what would be reasonable and certain as profits is a question of fact, yet there must be purported evidence upon which to base a finding. We think such purported evidence is wanting in this record. The evidence of the defendant upon that question is clearly "uncertain and speculative," nor do we see how it can be said, upon mere implication or inference, that such an

extravagant profit could have been within the contemplation of plaintiffs when they entered into the contract, much less that they could have deemed themselves as liable for damages to such an amount for mere delay in delivery. On the contrary, we think that the whole tendency of the evidence which consists of the correspondence of the parties is to show that damages of such a nature were never contemplated by either party. The proof of the damage for alleged loss of profits rests wholly upon the opinion of the defendant above quoted. This opinion is supported by no data whatever. The only pretense of data offered as a basis for such opinion is the statement of the witness that he actually sold about 320,000 in the year 1901, and the further statement that in January, 1901, he was then selling an average of "30,000 or 40,000 per month." He actually received from the plaintiffs an average of 30,000 for the whole year. In September and October he had sufficient on hand that he asked for more time between shipments in order to enable him to pay. On February 7, 1902, he wrote that he had enough on hand to last him "indefinitely." On May 1, 1902, he wrote that he had 125,000 on hand. Between January 1 and May 1, 1902, he had received a little less than 75,000. He must have had on hand, therefore, at the close of the year 1901, not less than 50,000, taking no account of any sales made between January, 1902, and May, 1902. If he made any sales within that period, the amount of such sales represented an excess of over 50,000 on hand at the close of the year 1901. But if he made no sales, it only emphasizes the uncertainty of his trade when he had goods on hand. The effect of defendant's own testimony is that his opinion as to the amount of lost profits is wholly unsupported by any proper data.

The rule as to loss of profits is that they are not to be rejected as being necessarily uncertain and speculative,

but, when they are in fact uncertain and speculative in a given case, they cannot be considered because incapable of adequate proof. This question is quite fully discussed in *Hichhorn v. Bradley*, 117 Iowa, 130. See, also, *Howe v. Boyson*, 44 Iowa, 159; *Winnie v. Kelley*, 34 Iowa, 339; *Bank v. Thurman*, 69 Iowa, 693; *Manufacturing Co. v. Creamery*, 120 Iowa, 584; *Wakeman v. Wheeler*, 101 N. Y. 205 (4 N. E. 264, 54 Am. Rep. 676); *Central Coal Co. v. Hartman*, 111 Fed. 96 (49 C. C. A. 244); *U. S. v. Behan*, 110 U. S. 338 (4 Sup. Ct. 81, 28 L. Ed. 168.) We are clearly of the opinion that the alleged profits claimed in this case were not shown by any proper proof. The opinion of the defendant was the merest guess, without any data to support it. The profits claimed by him, both by his pleading and by his evidence, are so enormous and exaggerated as to be clearly speculative and beyond the ordinary contemplation of any contracting party. Indeed, it is plainly manifest from the defendant's correspondence that he himself never contemplated such alleged loss of profits as basis for a claim of damages.

His claim is now based upon mere delay in delivery. If there had been failure on the part of plaintiffs to deliver at all, at any time, the defendant's damage could be no greater than he now claims for the delay alone. His theory is that he became entitled to such damages immediately when the delay occurred, and that the breach was not healed by a subsequent delivery. If, however, he had claimed such damages at such time, the payment thereof by the plaintiffs would have excused them from any further performance of the contract. The defendant could not, as a matter of right, claim these damages for delay and claim later performance also. Without making any claim for such damages at any time the defendant requested and received a continuance of the deliveries after the expiration of the year 1901. While an

6. SAME.

acceptance of delayed performance is not necessarily inconsistent with a claim for damages caused by the delay, it is inconsistent with a claim of damages for complete loss of profits. The plaintiffs could not be required to pay him his full estimated profits as damages, and then be required to make the delivery of the goods at a later date, in order that additional profits might be made therefrom. We are referring now only to the first contract, wherein the undertaking of plaintiffs was more absolute than in the second. We think it must be said that it appears conclusively from the correspondence that the measure of damages now claimed was not within the contemplation of either party; and, further, that if it was, it was clearly waived by the defendant by his subsequent conduct.

After the cancellation of the second contract in December, 1902, the plaintiffs on January 19, 1903, sent the defendant a statement for a purported "balance" due the plaintiffs amounting to \$92.66. The defendant and responding, under date of January 26th wrote: "We inclose check for \$92.66 to balance 1902 account as per statement." On January 29, 1903, he wrote again: "We wrote you on the 26th inclosing check for \$92.66 to balance 1902 account." This was the final adjustment of all the business between the parties under the contracts of 1901 and 1902, and no suggestion had yet ever been made by the defendant of any offset for damages. In January, 1903, the defendant placed a new order with the plaintiff for 25,000, which the plaintiffs shipped promptly. This order was never paid for, and is the order upon which suit was brought, and against which the counterclaim has been set up. It should be noted that this correspondence of January, 1903, was preceded by a mutual agreement between the parties in December, 1902, canceling the outstanding orders of the defendant. This agreement was made in pursuance of the

7. SAME: breach  
of contract:  
waiver of  
damages.

request of the defendant. The defendant may have been entitled as a matter of law to make such cancellation without the consent of the plaintiffs. He did not claim such right. He did request their consent to such cancellation and obtained it. The effect of this agreement was necessarily a termination of all further obligations of the parties to each other under the previous contracts. Taking the record before us, the conclusion is unavoidable that the verdict rendered was a grave miscarriage of justice. Plaintiff's motion to set the same aside should have been sustained. The foregoing discussion discloses our view, also, that upon the record as made a verdict ought to have been directed for the plaintiffs. Upon this appeal, however, we can do no more than to order a new trial.

IV. The appellee moves to affirm the judgment in this case because of the failure of appellant to conform to the rules of this court in the preparation of abstract and argument. It must be said that appellant's abstract and argument are fairly subject to criticism. We do not think, however, that an affirmance would be justified on that account. We think a sufficient penalty can be imposed by proper order for the taxation of costs. It will be the order of the court that appellants recover only one-half their taxable costs for printing in this court.

The judgment of the court below will be *reversed*, and the case *remanded*.

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In the Matter of the Estate of GRACE R. SPANGLER,  
Deceased.

**Taxation: CHARITABLE BEQUESTS: EXEMPTION.** A devise of the use, rents and profits of certain lands in perpetuity to the dependent poor of a specified county who are maintained wholly or in part by the county, and constituting the board of supervisors of said county trustees to receive and carry the trust into effect, is a



charitable gift to the county as a charitable institution, and is exempt from the inheritance tax.

*Appeal from Delaware District Court.*—HON. CHAS. E. RANSIER, Judge.

WEDNESDAY, SEPTEMBER 21, 1910.

THE opinion states the case. *Affirmed in part and reversed in part.*

*H. W. Byers*, Attorney General, *George M. Cosson*, Assistant Attorney General, and *A. M. Cloud*, County Attorney, for appellant.

*Yoran & Yoran*, for appellee.

WEAVER, J.—Grace R. Spangler, a resident of Delaware County, Iowa, died testate seized of certain lands in said county. Among the devises contained in said will was one of the use, rents, and profits of a certain described tract of land “in perpetuity to the dependent poor persons of Delaware County who are maintained wholly or in part at the expense of said county,” and constituting the board of supervisors of said county trustees “to receive and carry into effect the trust for the benefit of said named beneficiaries.” After reciting certain conditions relative to the management and execution of the trust, the will provides that, in the event said board of supervisors shall refuse to accept and enter upon the discharge of this trust, or having assumed said trust shall thereafter at any time refuse to longer execute the same, “then and in that event I give, devise and bequeath the equal one-half thereof to my legal heirs then living and the other equal one-half thereof to the legal heirs of my deceased husband, H. C. Spangler.” After the will had been duly probated and

a claim having been made that the property in question was subject to a collateral inheritance tax, an appraisal thereof was ordered and the appraisers reported its valuation at \$9,600. The executor of the will resisted such taxation on the theory that the gift, being to charitable uses, was not taxable. The trial court overruled the objection, and held the property to be taxable, but ordered a reappraisal thereof. The court appears to have taken the view that the gift to the dependent poor was at most a gift of defeasible or uncertain estate liable to be terminated at any time by the act of the supervisors in surrendering or abandoning said trust, or by their neglect to carry out the terms thereof, and that the appraisal of the value of said interest should be made with due reference to such fact. On reappraisal, the commission reported the value of the interest devised to the dependent poor at \$4,000. To this report the Treasurer of State made objection on account of various alleged defects in the proceedings, and because the valuation reported was not made fairly or in good faith, and was not the full and true value of the property. The executor also objected thereto on the ground the property to be devised was not liable to a collateral inheritance tax. Both objections were overruled, and the appraisal approved and a tax of \$200 was levied on the property. Both parties have taken an appeal, but the State Treasurer, having been first to perfect it, will appear in the record as appellant and the executor as appellee.

We give first consideration to the inquiry whether the gift in question is within the scope and meaning of the statute which exempts from the inheritance tax, devises and bequests to or for "charitable . . . societies and institutions," for, if the appellee is right in contending that this question must be answered in the affirmative, then all other propositions discussed by counsel may be ignored

as immaterial. Stated in brief and ordinary terms, the testator has created a trust in the county of Delaware or the executive board through which it exercises its legal powers, which trust is to be administered for the benefit and relief of the dependent poor who have become the recipients of public charity at the hands of said county. That this is a charitable gift is so clear as to be beyond dispute and the appellant does not contend otherwise, but counsel say that neither the county nor its executive board is a charitable society or institution and therefore the exemption is not applicable. If the statute had limited the exemption to societies and institutions having no other purpose or function than works of benevolence and charity, we might be forced to sustain the point thus raised and order a reversal upon the Treasurer's appeal. But, if the construction is not to be thus narrowed and any society or institution is within the terms of the law "charitable" when by the law of its organization or by usage it is charged with the duty of providing and administering charitable relief even though it has and exercises other functions of a totally different character, then in our judgment the gift in question is not taxable. That the law in this respect is to be liberally construed to promote the benevolent purpose of the exemption has already been held by this court in *Morrow v. Smith*, 145 Iowa, 514. The theory and purpose of the statute and its applicability to institutions which provide for and administer charitable relief although not devoted exclusively to such work, is there quite fully considered, and we need not here repeat or enlarge upon the discussion. Under the law of this state each county acting through its board of supervisors is expressly charged with the duty of relieving the necessities of destitute persons and the several counties are required or authorized to provide farms, homes, hospitals, and other appropriate places and institutions in which and by means of which

these unfortunate ones are supplied with the necessities of life. Code, sections 422, 2216-2252. The county, being thus charged with the duty of relieving and supporting the poor, is to that extent a charitable organization, and a gift made specifically in aid of this feature of its work is to all reasonable intents and purposes a gift to or for a charitable institution. As aptly fitting the case here presented, we quote from *Morrow v. Smith, supra*, the following: "Inasmuch as the Legislature did not see fit to restrict the term 'charitable institutions,' we would not be justified in placing such restrictions upon it unless such restriction inheres in the legal meaning of the term or unless such interpretation be necessary to harmonize this with other provisions of the statute or to save its validity for constitutional or other reasons. This provision as it is conflicts with no other. It is neither inconsistent nor unreasonable. We are constrained, therefore, to hold that the defendant in its relation to this devise is a 'charitable institution' within the meaning of the collateral inheritance statute."

Such being our conclusion, there is no occasion for prolonging this opinion. It follows that the decree below must be affirmed on the Treasurer's appeal and reversed upon the appeal of the executor of the will. Cause will be remanded to the district court for decree in harmony with the views here expressed.

*Affirmed in part and reversed in part.*

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THOS. HICKEY, Appellant, v. WEBSTER Co., Iowa, and THE BOARD OF SUPERVISORS, Appellees.

**Appeal:** REVIEW OF QUESTIONS NOT URGED BELOW. Where a party proceeds to trial on the merits without objection, after the cause has been reinstated and the trial ordered, the successful party can not urge on appeal that the court had no jurisdiction because there was nothing before it for trial.

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**Same:** NOTICE: SUFFICIENCY. A notice of appeal addressed to and  
2 served upon the attorneys appearing for all defendants and ap-  
pellees in the trial court is sufficient.

**Evidence:** INSTRUCTION: INVASION OF PROVINCE OF JURY. Where the  
3 witnesses for one party, on the question of the comparative value  
of land immediately before and immediately after the establish-  
ment of a drainage ditch, based their evidence upon personal  
knowledge of the land, and the witnesses for the adverse party  
having no personal knowledge testified in response to hypothetical  
questions, an instruction that the jury might consider the personal  
knowledge of the witnesses or their lack of personal knowledge  
of the land, and give to the testimony of each class of witnesses  
the weight it is entitled to, did not direct them to attach greater  
weight to one class of evidence than the other, and did not in-  
vade the province of the jury.

**New trial:** READING OF INSTRUCTIONS: MISCONDUCT. The act of the  
4 trial court in reading his instructions which were favorable to  
the defeated party in a lower tone of voice was not prejudicial  
error. And where, as in this case, the affidavit in support of the  
alleged error was contradicted the appellate court will indulge  
the presumption existing in favor of the ruling of the trial court.

**Evidence:** WEIGHT: DETERMINATION BY JURY. In determining the  
5 value of land upon conflicting evidence consisting largely of mat-  
ters of opinion, the jury may adopt a middle ground and fix  
their verdict accordingly.

*Appeal from Webster District Court.*—HON. ROBT. M.  
WRIGHT, Judge.

WEDNESDAY, SEPTEMBER 21, 1910.

APPEAL from an award of damages in a drainage  
proceeding. *Affirmed.*

*Chantland & Hadley* for appellant.

*Mitchell & Hackler*, and *Kelleher & O'Connor*, for  
appellees.

EVANS, J.— In January, 1905, the board of super-

visors of Webster County established a drainage district, and ordered the construction of an open drainage ditch therein. This drainage district included plaintiff's farm of one hundred and sixty acres, and the proposed ditch was laid diagonally through such farm. The plaintiff duly filed with the board a claim for damages. This claim was refused *in toto* and the order of establishment was made without allowing any damages to the plaintiff. From the order disallowing damages the plaintiff appealed to the district court in March, 1905. The appeal was pending in such court until August 17, 1907, when a stipulation of settlement was entered into between plaintiff's attorney on the one hand, and the county attorney on the other, who had appeared in the case for the county and the board of supervisors. In February, 1908, certain property owners in the district appeared in the case and filed a petition asking to have the stipulation of settlement set aside. After hearing of this petition, the court sustained the same and ordered the settlement set aside, and ordered the appeal to be heard upon its merits. From this order no appeal was taken by either party. We have no occasion, therefore, to consider any question arising upon the record preceding such order of the court, although considerable of the record is devoted to that part of the proceedings.

1. It is urged by appellees that, after the submission of the petition to set aside the settlement, the plaintiff dismissed his appeal, and that there was nothing left for trial before the district court, and that therefore no jurisdiction could be acquired by this court. We infer that this alleged dismissal was made in pursuance of the settlement which had been entered into. Be this as it may the order of the court reinstated the case, and ordered a trial and the parties proceeded to trial on the merits without objection on the ground

1. APPEAL:  
review of  
questions not  
urged below.

now urged, and we do not think that the appellees are in any position to raise the question at the present time.

It is also urged by appellees that appellant failed to serve a notice of appeal upon the petitioners who became parties to the proceeding in the district court, and that the appeal should therefore be dismissed.

2. SAME:  
notice:  
sufficiency.

It appears, however, from the notice of appeal that it was addressed to and served upon the attorneys who appeared for all the defendants and appellees in the court below, and this was sufficient under the statute. We proceed, therefore, to a consideration of the appeal on its merits.

II. The controversy in the court below turned wholly upon one question of fact, viz., what was the comparative value of the plaintiff's farm immediately before and im-

3. EVIDENCE:  
instruction:  
invasion of  
province of  
jury.

mediately after the establishment of the ditch thereon, exclusive of benefits? The ditch was actually constructed in 1905, whereas the trial in the district court was not had until January, 1909, more than three years later. The testimony of the witnesses as to the value of the land immediately before the construction of the ditch necessarily related to a past time. The plaintiff was a witness in his own behalf, and, as such, he described the general condition and quality of his land as it was immediately before the construction of the ditch. He did not, however, testify to the value either before or after. He thereupon produced several witnesses who were not personally acquainted with the condition and quality of the land before the construction of the ditch, but who testified to its value hypothetically, basing their hypothetical evidence upon an assumed condition and quality of the land as testified to by the plaintiff himself. With possibly one exception, none of plaintiff's witnesses testified from personal knowledge as to the value of the land before the construction of the

ditch. Based upon hypothetical questions, these witnesses generally testified to the value of plaintiff's land as being \$20 an acre more before the construction of the ditch than after. Defendant's witnesses as to such value all testified that the acreage value of plaintiff's land was exactly the same before and after the construction of the ditch and based their testimony upon alleged personal acquaintance and knowledge. Some of them had farmed the land for many years and all of them claimed to be familiar with it. Going more into detail, the plaintiff claimed that the land appropriated by the ditch and by its berms and banks was practically all good tillable land; whereas, defendant's witnesses claimed that the land so appropriated was an old water course which was usually impassable and often contained water several feet deep, and that an old ditch had been dug in former years which had afforded partial relief, and that the new ditch appropriated the same land as was occupied by the old ditch. The jury awarded damages to the plaintiff in the sum of \$241.80. The plaintiff has appealed from this award as being wholly inadequate. No complaint is made here concerning any ruling of the court in the admission of testimony. Only one instruction is challenged and to that we give our attention.

The heart of such instruction is as follows: "For the purpose of determining the weight to be given to the testimony of the witnesses who have testified to the value of the plaintiff's land you are authorized to take into consideration the personal knowledge of said witnesses of said land or their lack of personal knowledge thereof at the time of, and before the time of, the establishment of the said ditch or drain, and to give to the testimony of both classes of witnesses the weight you deem it to be entitled to." The complaint is that the court made an invidious distinction between the witnesses of the respective parties



and represented them as being in two separate classes. We think the instruction under this record is not amenable to the criticism made. The fact that certain witnesses testified hypothetically, and not from personal knowledge, was a proper matter for the consideration of the jury, and the trial court might well have given the usual instruction on the subject of opinion evidence based upon hypothetical questions. The trial court did not do this, but directed the attention of the jury to the distinction in the nature of the testimony in the manner above indicated. The province of the jury was not thereby invaded. The jury was not directed to attach greater weight to one class of evidence than the other, but it was directed to give consideration to the distinction. If it be true that the practical effect of such caution would be favorable to testimony based upon personal knowledge, it is only because testimony of that nature, other things being equal, appeals to the disinterested mind as being the most credible. It does not, however, necessarily follow that such evidence is more credible in every case; but whether it be so in a given case is always a question to be determined therein by the jury in the light of all the evidence in the case. This rule was in no manner infringed by the instruction complained of. As bearing somewhat upon the question, see *Buford v. McGetchie*, 60 Iowa, 298; *Ayrhart v. Wilhelmy*, 135 Iowa, 290; *Bever v. Spangler*, 93 Iowa, 576; *Whitaker v. Parker*, 42 Iowa, 585; *Indianapolis v. Dunn*, 37 Ind. App. 248 (76 N. E. 269); *Cline v. Lindsey*, 110 Ind. 337 (11 N. E. 441).

III. The appellant complains of the manner in which the trial judge read his instructions to the jury, the general complaint being that such instructions as might be deemed favorable to the defendants were read by the court more impressively and effectively than were such instructions as might be

4. NEW TRIAL:  
reading of  
instructions:  
misconduct.

deemed favorable to the plaintiff. This point was made in the form of a motion for a new trial supported by an affidavit of counsel, a part of which is as follows:

I further on oath depose and say that at the reading of the instructions of the court to the jury, which were read to them immediately at the opening of court on Saturday morning of the trial, I was the only counsel for plaintiff present; that I had laid particular stress in my argument upon the fact that every one of the witnesses for the defendant who testified as to value and damages was in fact a party who owned land in the drainage district, and who would have to help pay any assessment which was recovered by the plaintiff in the case except Mr. Tonhouse, and his wife is a sister of Peter Grall, one of the interested witnesses who testified, so that the matter of interest was considered by plaintiff a strong point against the witnesses for the defense and so urged and argued; that, as a part of the argument, it was suggested that they listen for that part of the instructions of the court relating to the interest of witnesses, and see if I was not stating it correctly, and particularly to take it into consideration in their deliberations; that the trial court was present and listened to all of my argument, and knew the stress I had laid upon the said point; that in reading his instruction No. 9, when the court pronounced the words, 'his interest, if any, in the result of the controversy; his relation to the parties interested or the absence of such relations,' the court perceptibly lowered his tone of voice, thereby in effect discounting all of plaintiff's counsel's argument on that point, and affiant fully believes that such lowering of tone by the court resulted in a very great prejudice to his client the plaintiff in this cause.

This affidavit was controverted by counsel for the other side. It may be proper to suggest here that the burdens of this court will be greatly multiplied, if not magnified, if it must assume the responsibility of controlling the elocutionary taste and judgment of the trial courts. With some persons words seem more impressive when spoken in a loud tone of voice, and climaxes are

attained only in a high pitch; with others, the high tone loses its power and becomes wearisome, and the lower tones are welcomed as more restful and persuasive. Only the art of the orator, under the inspiration of the moment, can always determine the most effective modulation, whether high or low. If, therefore, it appeared as a fact in this record that the trial judge did at any stage in the reading of his instructions "perceptibly lower his tone of voice," it must be manifest to counsel upon further reflection that we would be quite helpless to determine from such fact whether appellant was hurt or helped by such modulations. Further, the affidavit itself is controverted, and a presumption must be indulged in favor of the ruling of the trial court. From either point of view we think the complaint is without merit, and that the criticism involved in it is not justified.

IV. Lastly, it is argued that the testimony on behalf of the defendants is so contradictory and unreasonable that it should be disregarded, and that the trial court ought to have accepted the testimony of plaintiff's witnesses and entered an award, notwithstanding the verdict for \$3,200 in accord with such testimony. The appellant has not sufficient ground on which to stand in this contention. See *Reuber v. Negles*, — Iowa, —. The controversy turned wholly upon a question of fact, and the evidence consisted almost wholly of matters of opinion. The jury had a right to adopt middle ground in its verdict. The verdict could well have been larger, but approximation was the best that could be done in any event. We are not favorably impressed with the candor of the witnesses on either side in the formation of their expressed opinions. On the one hand damages were greatly magnified and on the other they were minimized to the zero point. The jury seems to have done the best it could with the testimony before it. If the plaintiff could have produced in evidence more moderate

5. EVIDENCE:  
weight:  
determination  
by jury.

estimates, he could have laid the foundation for a better verdict.

On the record before us he appears to have had a fair trial, and the judgment below must therefore be affirmed.

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J. J. RICHARDSON AND OTHERS, Appellees, v. GEORGE W. ROBERTS AND OTHERS, Appellants.

**Action to restrain the sale of land: DENIAL OF RELIEF: EQUITY.**

Where the plaintiff in an action to restrain the sale of land under a judgment against his vendor, admits by demurring to the answer that in purchasing the land he assumed to pay the judgment and retained from the purchase price a sum sufficient for that purpose, but failed to pay the judgment, though still retaining the money, he will be denied affirmative relief, under the rule that he who asks equity must be willing to do equity.

*Appeal from Dallas District Court.*—HON. J. H. APPLE-  
GATE, Judge.

FRIDAY, FEBRUARY 18, 1910.

**ACTION** in equity to restrain sheriff's sale of land. The material facts of the case are stated in the opinion.  
*Reversed.*

*C. A. Robins*, for appellants.

*D. H. Miller*, for appellees.

WEAVER, J.—The plaintiffs allege that prior to the commencement of this action they sold and conveyed a certain tract of land to one Thurtle by deed with the usual

covenants of warranty, and that Thurtle has since conveyed it to one Grimes; that the defendant Roberts, having obtained a judgment against one McNamara, who was plaintiffs' grantor, and claiming that said judgment is a lien on said land, has caused execution to issue and to be levied thereon, and is threatening to subject the same to sheriff's sale for the satisfaction of said judgment debt. But plaintiffs allege that said judgment is not a lien on the land, nor is said property legally liable to be subjected to its payment, and therefore, in order to prevent a cloud upon the title to said property and to make good their warranty of said title, they ask that the threatened sale under said execution be enjoined. The answer, with its several amendments, pleads in substance as follows: That the plaintiff J. J. Richardson took his title to said land from Michael McNamara on January 12, 1905, and that prior thereto, on May 16, 1904, the defendants' judgment had become a lien on said land, and the same has never been discharged or removed. In a second count of their answer defendants allege that at the time Richardson took title from McNamara the land was subject to a decree foreclosing a mortgage thereon in favor of the plaintiff Richardson, and to an outstanding certificate of sheriff's sale under an execution upon another judgment against McNamara in favor of one McCall, both of which were prior to the lien of defendants' judgment; that in purchasing said land, and as a part of the purchase price thereof, said Richardson assumed and agreed to pay both the judgment debt to McCall and defendants' judgment, and, although he retained a sufficient sum from said purchase price to satisfy and discharge said liens, he has never paid or satisfied defendants' judgment, but to avoid said obligation and eliminate defendants' lien he has caused a sheriff's deed to issue upon the sale of the said land under the McCall judgment to his agent and representative, M. N. Richardson, who took the title so acquired for

plaintiffs' benefit. To this answer the plaintiffs demurred on the general ground that the pleading does not state facts constituting any defense to plaintiffs' cause of action. The demurrer was sustained, a decree entered as prayed by the plaintiffs, and defendants appeal.

Assuming, as we must, that J. J. Richardson, in purchasing the land in question, undertook the payment of the defendants' judgment and retained from the purchase price a sum sufficient to satisfy the same, we think the demurrer should have been overruled. The case as made by the record and as presented by the arguments of counsel presents for consideration only the relative rights and equities of the plaintiff J. J. Richardson and the defendant Roberts. Richardson is the party who invokes in his behalf the aid of a court of equity. It is an ancient and sound maxim that he who asks equity must be willing to do equity. The demurrer admits that in purchasing the land in question he deducted from the purchase price and still holds in his hands the money with which to pay the defendants' judgment; and without regard to the question whether as a matter of technical right the conveyance to him operated as a merger of the prior liens in his title, or whether the claim against him is one which might be enforced at law as for a debt or for money had and received, we think there is no rule of equity which will grant him affirmative relief against said judgment while he holds in his hands the money with which to pay it and fails and neglects so to do. See *Bispham's Equity*, section 43; *Morrison v. Hershire*, 32 Iowa, 271; *Kagy v. Ind. Dist.*, 117 Iowa, 694.

The decree in plaintiffs' favor will therefore be reversed, and the cause remanded for further proceedings in harmony with this opinion. *Reversed.*

A. M. DE FRANCE, Appellee, v. IDA REEVES, ET AL.,  
Appellants.

**Resulting trusts: EVIDENCE OF INTENT.** A resulting trust in favor  
1 of one paying the purchase price of land and taking the title  
in the name of another will not be established except upon clear  
and satisfactory evidence that the person so furnishing the money  
intended to take an interest in the property.

**Same.** Where the husband furnished the money to purchase land  
2 taking the title in his wife's name, no trust resulted *prima facie*  
in his favor, but it will be presumed that the furnishing of the  
purchase price was an advancement to the wife.

**Same: ACTION TO QUIET TITLE: EVIDENCE.** In this action by the hus-  
3 band to quiet title to land on the ground that it was purchased  
with his money and the title taken in his wife's name, the evi-  
dence is held to show that the same was purchased either with  
the wife's money or that the title was placed in her name to  
defeat plaintiff's creditors, and in neither event was the husband  
entitled to relief.

*Appeal from Wapello District Court.*—HON. D. M.  
ANDERSON, Judge.

TUESDAY, APRIL 5, 1910.

ACTION in equity to quiet title. There was a decree for  
the plaintiff. The defendants appeal. *Reversed.*

*Steck, Daugherty & Steck*, for appellants.

*Jaques & Jaques* and *W. W. Epps*, for appellee.

SHERWIN, J.—The appellee is the surviving husband  
of Amanda De France, who died in March, 1906, seized  
in fee of the real estate involved in this action. The

appellee in his petition alleges that he is the owner of one-half of said real estate by inheritance or descent from his said wife, and the owner of the remaining one-half of the property for the reason that his wife held the legal title thereto in trust for him; he claiming that all of the property was purchased with his money, but that the title thereto was placed in her name under an agreement that she would hold the same for him and for his benefit.

The appellants admit that the appellee is the owner of a one-half interest in said property by descent from his wife, Amanda De France, but allege that Amanda De France was the absolute owner of said property, and that they, as her heirs, are entitled to an undivided one-half thereof. The appellee and Amanda De France, his wife, were married in 1884. In 1885 or 1886 the appellee went to Omaha, Neb., where he remained about six months, and during that time he was engaged in the saloon business. In October, 1886, he sold his interest in the Omaha saloon and returned to Ottumwa, Iowa. On the 16th of October, 1886, a part of the property involved herein was purchased by the appellee, and the same was conveyed by the then owner by warranty deed to Amanda De France. In May, 1900, the rest of the property herein involved was purchased and conveyed to Amanda De France. The property first conveyed to Mrs. De France was occupied as the family homestead until her death in March, 1906. In 1889 a pop manufacturing business was established by the appellee on the homestead property. The business in all of its branches being conducted in the wife's name, and from the profits of such business the other property was bought and paid for.

The appellee contends, and the trial court so found, that the homestead was bought with his money, and that he at all times was the beneficial owner of the same. He also claims that he was at all times the owner of the pop business, and that it was conducted in his wife's



name only for the purpose of securing enlarged credit, and that the other real estate purchased was paid for from the profits of the business, and that his wife held the title thereto for his benefit.

We think the trial court reached a wrong conclusion. It is well established that a resulting trust will not be declared unless the evidence in support thereof is clear, certain, and convincing. *Murphy v. Hanscome*, 76 Iowa, 192. If it be shown that the person who furnished the money for the purchase did not intend to take a beneficial interest, or if the conveyance is to one who stands in such relation to him as to indicate that the consideration was an advancement or gift to the one who takes the legal title, no trust will result. *Acker v. Priest*, 92 Iowa, 610.

1. RESULTING  
TRUSTS:  
evidence  
of intent.

Where money is furnished by the husband for the purchase of land, the legal title to which is placed in the wife's name, there is a presumption that the money was furnished by way of advancement, and not for the purpose of creating a trust in favor of the husband. *Andrew v. Andrew*, 114 Iowa, 524.

With the equitable rules in mind, let us look at the evidence supporting the claim of the appellee. The wife stated that the title was placed in her name "for safety, if anything should happen." Nothing could happen except the death of the husband before that of the wife, or business reverses which might absorb the property, in either of which events the wife would receive no protection from the conveyance unless something more than the naked legal title was vested in her. She must also have the beneficial interest, because, if she held only in trust for the appellee, his heirs and his creditors could enforce the same after his death. Not only was the title to the property in her name, and the pop business conducted in her name but in a suit against a third party the appellee signed and verified a petition in

3. SAME:  
action to  
quiet title:  
evidence.

which it was stated that the plaintiff therein, Amanda De France, was the owner of certain shipping cases, the recovery of which was sought in said suit. And on the trial of this case the appellee admitted that the cases involved in the suit against such third party were some of the cases used in the business conducted in his wife's name. A suit was also brought in his wife's name against one Kruger, in which the appellee testified that the property was owned by his wife, and that he was simply managing it for her as her agent. One W. A. Carnes obtained a judgment against the appellee in January, 1888, upon which executions were repeatedly issued and as often returned unsatisfied, until after the wife's death in 1906. And he told Mr. Carnes' attorney that he had no property; that the property and business belonged to his wife. Similar statements were made to others. He counseled and assisted his wife in making a will, by which she asserted ownership of the property and undertook to dispose of the same and after her death he offered the will for probate. Upon the trial of this case below he swore that he did not own or claim to own the pop business and factory, but his wife owned it until it was sold, and that he transacted her business as an agent. Furthermore, before any of the property in controversy had been acquired, the appellee executed a chattel mortgage for \$500 which was without consideration and never was paid.

It is manifest that the title to the property bought in 1900 was either bought with the wife's money, or placed in her name for the purpose of defeating the claims of his creditors, in either of which events the appellee can have no relief.

Where title is conveyed for the purpose of defrauding creditors, equity will not restore it. *Mellin Crawford Co. v. Ames*, 39 Iowa, 283; *Briggs v. Coffin*, 91 Iowa, 329; *Baldwin v. Davis*, 118 Iowa, 36; *Cloud v. Malvin*, 108 Iowa, 52. The conduct and the statements of the appellee,

together with the whole record, leave no doubt in our minds as to the judgment which should be rendered herein.

The plaintiff has failed to make a case, and the judgment must be, and it is, *reversed*.

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**ANNA SHERMAN CHANTLAND, Appellant, v. CARRIE SHERMAN, Appellee.**

**Specific performance:** AGREEMENT TO DEVISE: SUFFICIENCY OF EVIDENCE. In this action to enforce an agreement to will property to plaintiff, or to cancel conveyances made to defendant in consideration of such an agreement, the evidence is reviewed and held sufficient to establish the agreement.

**Same:** PERFORMANCE BY ONE PARTY: STATUTE OF FRAUDS. Where the devisee of a remainder conveys his interest in the property to the life tenant, in consideration of an agreement by the life tenant to will the property to him, together with an interest in the life tenant's own property, the statute of frauds is not an obstacle to an enforcement of the agreement, because of performance of the contract by the remainderman.

**Conveyances:** CONSIDERATION. Where a conveyance recites a consideration of \$1 and love and affection, extrinsic evidence is admissible to prove an additional consideration.

**Wills:** AGREEMENT TO DEVISE: CONSIDERATION. Where a will gives to the widow simply control over the property during her life, a conveyance to her by the remainderman of his interest therein will constitute a sufficient consideration for an agreement by the widow to devise a portion of the property to such remainderman.

**Same:** BREACH OF AGREEMENT: RELIEF. While an agreement to devise property can not be specifically enforced during the life of the promisor, yet upon repudiation of the agreement or disposition of the property to be willed a cause of action may accrue, and its enforcement for analogous relief by way of rescission or the recovery of damages may be had.

*Appeal from Cherokee District Court.—HON. F. R. GAYNOR, Judge.*

SATURDAY, APRIL 9, 1910.

ACTION to enforce an alleged oral agreement to execute a will or to cancel certain conveyances because procured by fraud resulted, on hearing, in the dismissal of the petition. Plaintiff appeals. *Reversed and remanded.*

*Herrick & Herrick* and *Augustus Graham*, for appellant.

*Molyneux & Maher*, for appellee.

LADD, J.—Plaintiff is the only child of J. A. Sherman, a physician of Cherokee, who died testate October 10, 1899. The defendant was the second wife of deceased, having been married to him January 1, 1889, and was childless. She had been married previously and had an adopted daughter, Mae Williams, who died, after she had married, leaving a son. The will of deceased directed: (1) The payment of the debts and funeral expenses; (2) bequeathed his personal property to his wife "for her use and benefit during her lifetime, giving to my said wife full control over said property;" (3) devised all his real estate to his wife, "together with the hereditaments and appurtenances thereto belonging or in any wise appertaining to have and to hold to my wife, Carrie Sherman, during her lifetime with full power to control the same during her lifetime as though this was an absolute bequest;" (4) recited that he had set aside a life insurance policy of \$1,000 to his daughter, Anna Sherman, to be used in the completion of her education; and (5) directed that "all of my property, both real and personal, of whatever kind or character or nature, that remain at the time of the death of my wife, Carrie Sherman, be equally divided between my daughter, Anna Sherman, and my stepdaughter, Mae Williams, share and share alike." It nominated the

widow as executrix and recommended that she be allowed to qualify without bond. Within two weeks after Sherman's death, Anna Sherman and Mae Williams executed to the widow, defendant therein, a bill of sale transferring to her all their interest in the personal property of deceased and a deed conveying to her all their interest in the real estate left by him. The petition, in the first division alleges that these conveyances were executed in pursuance of an oral agreement between the grantors and grantee therein, by the terms of which, as consideration thereof, defendant undertook to will to each of them the property, which each so transferred and one-half of her own property; that, though defendant often had promised performance on her part, she utterly refused to execute a will as agreed on February 23, 1907, repudiated her promise so to do, and threatened to make other disposition of the property. In the second division of the petition, an agreement and repudiation thereof as stated above was alleged, and, in addition thereto, a secret intention not to perform the same, and that, because of the situation and relation of the parties, the conveyances were procured by fraud, and, as alternative relief, the cancellation of the bill of sale and deed was prayed. The answer admitted the execution of these instruments, denied that this was in pursuance of any agreement, or that they were procured by fraud, averred title under the will, averred that the property was set apart to her by the court upon final settlement of the estate of which plaintiff had notice, alleged that the cause of action contained in the first division of the petition had not accrued, and that as the cause pleaded in the second division was not set up until the trial began, plaintiff had elected to rely on the cause contained in the first division, and prayed to go hence with her costs.

I. The doctor died October 10, 1899, and on the 21st of that month the bill of sale, and two days later the deed, was executed. The will was admitted to probate

on the date last mentioned, and on the same day defendant qualified as executrix and the inventory was filed. Plaintiff was then under twenty years of age and Mae Williams about three years older. Both were members of defendant's household and neither had had any business experience or knew the extent or nature of the estate left by deceased. Save an absence of a year at the State Normal School, plaintiff had resided with her father and defendant since their marriage, as also had Mae Williams, when not away at school. The attitude of both toward the defendant was that of a child to a mother, and undoubtedly she exercised over them the influence mothers usually do over grown daughters. Plaintiff testified that an attorney of her acquaintance for many years and in whom she reposed entire confidence came to the house on the 21st of October, 1899, and that defendant called her and Mae Williams into the room where he was and explained that the attorney had advised her the will was drawn in such a way that she would have to keep an account of all money expended during her life; that this would involve much work; that deceased had always thought a great deal of Mae and had often expressed a desire that she share alike with plaintiff in the property and proposed, if plaintiff and Mae would convey to her all their interest in the estate, this would relieve her from keeping an account, and she would, when she died, divide the property equally between them, as that was the idea of deceased and she wanted to carry it out in her will; that plaintiff had not talked with the attorney before, though he assured her in defendant's hearing that he would see that such will was made, to which defendant added that she would make the will as soon as she got to it; that, in response thereto, plaintiff and Mae expressed their willingness and, in reliance on what was said, executed the bill of sale, which the attorney then drew from his pocket and afterwards the deed. The attorney loaned

1. SPECIFIC  
PERFORMANCE:  
agreement  
to devise:  
sufficiency of  
evidence.

defendant a dollar to be paid each of the girls upon the execution of each instrument, and she handed the same to them; the attorney explaining that this was done to render the instrument binding. The witness testified of two subsequent conversations with defendant in which the latter expressed her purpose to make the will as soon as she could get to it. Plaintiff's husband testified that he called on defendant February 23, 1907, and, after suggesting that upon her death plaintiff would inherit nothing, said to her that he thought she ought to make her will as agreed, to which she replied that she would not make the will; that he asked if she had not promised to and she responded: "When I said that, I did not mean I was going to give Anna my property, because I have too many relatives of my own to do that."

On the other hand, the defendant testified that on meeting the attorney on the street he had inquired how she was coming on, to which she replied that bills were coming in faster than funds to meet them, and asked if there was any way out of this; that he remarked that there was just one way, and that was for the girls to sign to her; that she said Mae would do as she wished, but she did not know about plaintiff; that the attorney replied that he would talk with them; and that the next she knew he brought the papers to the house and they signed them; that she made no explanation or promise to them; that the attorney merely asked if they were ready to sign, and, responding that they were, they signed the bill of sale and deed; that she was surprised at it being done so quickly and had no part therein save as stated; and that the matter of willing the property was not mentioned. On cross-examination, in answer to an inquiry as to whether the witness ever told plaintiff she would make a will in her favor she responded: "No, not exactly; but I have always thought I might." Being reminded that the inquiry was for what she said, not thought, she again answered: "No,

I don't think I ever did." To another question, she answered that she did not think she said anything to plaintiff's husband about making the will, and later that she did not remember anything about it. Concerning a conversation had subsequent to the beginning of the suit, she was asked: "Is that the time you said, if you said anything about a will you meant her father's property, and not your property? A. I never once thought of my own property in any connection with it. Q. Was that the time you were having this conversation that this was said? A. Yes, it was at that time. Is that what you want?" Later she denied that anything of the kind was said. She testified, further, that she had always thought that some time she would make a will, and carry out what deceased had provided in his will—that is, divide the property between the girls—but that she had changed her mind and did not intend plaintiff should have any of it.

Such is the record before us—the testimony of plaintiff simple, direct and natural; that of defendant evasive and unreasonable, and, if true, discreditable alike to herself and attorney. The stepdaughter, without some inducement or representation, would not have been likely voluntarily to part with all the property she had. No reputable lawyer would be a party to the procurement without consideration from a girl under twenty years of age, without business experience, bereaved by the recent death of her father, of the bounty he had bestowed upon her—all she had. No woman, actuated by proper motives, standing *in loco parentis*, would allow her stepdaughter thus to divest herself of all the property to which she was entitled under the will even though this might enable her to appropriate it to her own use. We prefer a finding consistent with fair dealing on the part of the attorney whom death has silenced, and with an honest purpose on the part of the defendant, especially when supported by convincing evidence. From a separate examination of the record, we have become



satisfied that the defendant's thought that she would some time will the property so it would be equally divided between her adopted daughter and stepdaughter after her death had its origin in the promise she had made as alleged, and that, in pursuance of such promise, the conveyances were executed.

II. The plaintiff and Mae Williams having fully performed, the statute of frauds interposes  
 2. SAME: performance by one party: statute of frauds. no obstacle to the enforcement of the agreement to will the property. *Allbright v. Hannah*, 103 Iowa, 98; *Bird v. Jacobus*, 113 Iowa, 194; *Mueller v. Batcheler*, 131 Iowa, 650.

The deed and bill of sale recited the consideration as one dollar with love and affection. Appellee contends that extrinsic evidence was not admissible to prove the additional consideration as alleged. That  
 3. CONVEYANCES: consideration. the rule is otherwise sufficiently appears from *Lawton v. Buckingham*, 15 Iowa, 22; *Puttman v. Haltey*, 24 Iowa, 425; *Trayer v. Reeder*, 45 Iowa, 272; *Bossingham v. Syck*, 118 Iowa, 192; *Allen v. Rees*, 136 Iowa, 423.

III. Though under the respective clauses of the will the widow was entitled to exercise full control over the real and personal property, title thereto did not pass to her. *Hoefliger v. Hoefliger*, 132 Iowa, 575. And for this reason the execution of the conveyances constituted ample consideration for the agreement to make the will.  
 4. WILL: agreement to devise: consideration.

Such an agreement may not be specifically enforced until the death of the party agreeing to execute the will. *Johnson v. Hubbell*, 10 N. J. Eq. 332 (66 Am. Dec. 773); *Bolman v. Overall*, 80 Ala. 451 (2 South. 624, 60 Am. Rep. 107.) The reason for this is that the will may be made at any time during life. *Manning v. Pippen*, 86 Ala. 357 (5 South. 572, 11 Am. St. Rep. 46; 25 Ency. 1075.) But, upon  
 5. SAME: breach of agreement: relief.

repudiation of such an agreement by denying its existence or by disposing of the property to be willed, a cause of action may accrue for the enforcement of the agreement through analogous relief, rescission, or the recovery of damages. Otherwise, performance might be defeated by rendering this impossible by the disposition of the property or through inability to prove the contract after the death of the promisor.

In *Carmichael v. Carmichael*, 72 Mich. 76 (40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528), a conveyance to a third person was set aside and a decree directed to be entered such as would prevent the party promising to make the will from violating the agreement. In *Duval v. Duval*, 54 N. J. Eq. 581 (35 Atl. 750), a wife, who, on ample consideration, had promised to execute a will of certain property to her husband, repudiated the agreement, and in a suit to protect the husband's rights the vice chancellor said: "While it is true that a promise to make a certain will is not broken until the death of the promisor, and it is true that actions in which such promises have been enforced have been in cases occurring after the death of the promisor, yet I do not see why the court can not, upon the principle of *quia timet*, fix upon the property a liability to answer the promise, in any case where the promisor has, during life, repudiated its terms, and attempted to make other disposition of the property. This Mrs. Duval has done, and now, by her answer, claims the absolute right to do. Chancellor Williamson recognized the right of the promisee to protection upon the principle of *quia timet* in the case of *Vanduyne v. Vreeland*, *supra*, (12 N. J. Eq. 142). Vreeland and wife had adopted a child under a promise that all the property they had should at his death go to the child. Before his death, Vreeland sold the property for the purpose of cutting out the right of the adopted child to a purchaser who had notice of such rights. Al-

though the complainant in that case, under the agreement, had no right to the property until the death of Vreeland, yet the chancellor decreed that the purchaser held the property subject to the agreement between Vreeland and his adopted son, and that upon the death of Vreeland, and after the accounting, the purchaser should convey the property to the complainant. I will advise a decree that the defendant holds her title to the property in suit subject to the trust mentioned, as well as subject to her agreement to make a will for it in favor of the complainant; also, that she be enjoined, while the complainant is living, from making a will devising the property to any person other than the complainant; and that, in the event of her dying during the life of her husband, her heirs at law shall at once execute a conveyance of the said property to the complainant." On appeal to the Court of Errors and Appeals, the principle was affirmed; the modification being in a matter of detail. *Duvale v. Duvale*, 56 N. J. Eq. 375 (39 Atl. 687, 40 Atl. 440.)

Contracts which contemplate the conveyance of estates in remainder or the devise thereof have frequently been enforced by the courts, upon the denial of such obligation. Thus, in *Reilly v. Reilly*, 135 Iowa, 440, two boys were induced to live with and work for the owner of forty acres of land on the promise that they should have the farm after the owner's death, and, upon denial of all obligation to perform and performance by the boys, they were held entitled to a decree conveying the forty acres subject to the homestead rights of the owners. In the case at bar, defendant not only denied the making of the agreement, but expressed her intention not to leave plaintiff any property derived from the estate of decedent. Having thus repudiated her agreement, plaintiff was not required to incur the risk of being unable to establish the contract after her death nor of the property being put beyond reach. Her interest in the property was such as

to entitle her to the protection of the courts. See *Buzick v. Buzick*, 44 Iowa, 259. The situation is somewhat novel, but courts of equity are not bound to give any stereotyped form of relief. They readily adapt the relief to the peculiar facts of the case, and their sole concern is that the decree entered shall effectuate justice. *Campbell v. Moorehouse*, 141 Iowa, 568; *Creveling v. Banta*, 138 Iowa, 47; *King v. Ordway*, 73 Iowa, 735; *Hale v. Kobbert*, 109 Iowa, 128. Had defendant carried out the agreement, the plaintiff, if living, or her heirs, if she died before defendant, would take the undivided one-half of the estate deceased left. Section 3281, Code. So that a conveyance of the undivided one-half of the real estate left by deceased subject to the use and control of defendant during life will save to each party the interest to which each would be entitled were the agreement executed. As the trial court dismissed the petition, no finding was made as to whether the personal property exceeded the debts and other charges against the same. The cause is remanded for the entry of decree requiring such a conveyance of the realty and the determination of such excess, if any, of personalty, and declaring defendant's right to the use and control of one-half thereof during life, and that upon her death plaintiff shall be entitled to the same. See *Scott v. Scott*, 137 Iowa, 239.

*Reversed and remanded.*

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HUGH SULLIVAN and DASIE V. ORTON and JOHN M. ORTON, Minors, by their next Friend, WILLIAM ORTON, Appellees, v. KITTIE KENNEY and E. N. KENNEY, Appellants.

**Actions:** MISJOINDER OF LEGAL AND EQUITABLE CAUSES: WAIVER OF  
1 ERROR. Where an independent action is subsequently brought upon certain counts of a petition embracing also equitable causes of action against the same defendants, and by stipulation the cases

are consolidated and no motion is made to transfer the legal causes to the law docket for trial, any error in refusing to strike the counts from the original petition because of a misjoinder of legal and equitable actions was waived.

**Wills: PROBATE OF FOREIGN WILLS: AUTHENTICATION OF PROCEEDINGS:**

2 **OBJECTIONS: WAIVER.** The proponent of a foreign will by pleading over and attempting to meet objections to the probate in this state, on the ground that the proceedings in the foreign court were not properly authenticated, waives any error in the ruling sustaining the objection.

**Evidence: AUTHENTICATION OF FOREIGN JUDICIAL PROCEEDINGS.**

3 The authentication of judicial proceedings in a foreign state need not conform to the federal statute prescribing the requisites of such proof, provided the same is in conformity with the state law; which, however, can not make additional requirements but may provide for less proof than the federal statute requires.

**Wills: PROBATE OF FOREIGN WILL: AUTHENTICATION.**

4 The authentication of the probate of a will in a foreign state consisting of a copy of the will, the record of its probate, attestation by the clerk of court and the certificate of the judge that his attestation was in due form, is sufficient to authorize admission of the will to probate in this state as a foreign will.

**Same: JURISDICTION.**

5 Mental capacity and undue influence are questions which do not go directly to the jurisdiction of a foreign court to probate a will, but the testator's mental capacity may be considered on the question of his change of domicile as bearing upon the jurisdiction.

**Same.**

6 A foreign judgment admitting a will to probate may be attacked for want of jurisdiction although the court rendering the judgment expressly found that it had jurisdiction.

**Same: PROBATE: PRODUCTION OF ORIGINAL WILL.**

7 Where it is claimed that a will is entitled to probate as a domestic will the original instrument must be produced.

**Fraudulent conveyances: TRUST AND CONFIDENCE: UNDUE INFLUENCE:**

8 **PRESUMPTION: BURDEN OF PROOF.** Where a relation of trust and confidence is shown and it appears that the stronger and controlling mind has obtained the conveyance of property or acquired other pecuniary advantage, it will be presumed that such person exercised an undue influence to his own advantage; and the transaction will be set aside by a court of equity unless the beneficiary establishes by abundant proof that the transaction was free, fair and in the utmost good faith.

**Wills: PROBATE: BURDEN OF PROOF.** In a proceeding to probate a will made and probated in a foreign state the burden is upon the contestants to show that the foreign court had no jurisdiction; and this involves an affirmative showing that the testator was not domiciled within the jurisdiction of the foreign court at the time of his death, where that question is in issue.

**Fraudulent conveyances: UNDUE INFLUENCE: EVIDENCE.** In this proceeding to set aside conveyances of land from an aged father to his daughter, and to recover money turned over to her, the evidence is reviewed and held to show that the father was possessed of insane delusions and hallucinations materially affecting his mind, and that by reason of such fact the defendants were able to and did exercise an undue influence over the grantor in procuring the conveyance, and the transfer of the money.

**Wills: UNDUE INFLUENCE.** The evidence in this action is also held to show that a will of the grantor leaving his entire estate to a daughter, to the exclusion of his other heirs, was obtained by fraud and undue influence.

**Sale of real property situate in a foreign state: JURISDICTION OF PROCEEDS.** Although the court has no jurisdiction to partition land situated in another state it does have jurisdiction over actions *in personam*, and may entertain actions to secure a conveyance of the land or declare a trust therein. So that where lands in another state were sold pending actions involving the right thereto, the proceeds arising from the sale partake of the nature of real estate and may be followed into the hands of the seller and disposed of by a court having jurisdiction of his person.

*Appeal from Jasper District Court.*—HON. BYRON W. PRESTON, Judge.

TUESDAY, MAY 10, 1910.

THREE proceedings instituted in the district court of Jasper County were consolidated and tried as one in the lower court. One was originally an action in equity brought by plaintiff against the defendants to set aside deeds to quiet title to the land conveyed thereby, for partition, an accounting, and other equitable relief. Another was an action at law brought by Hugh S. Sullivan, as

administrator of the estate of John Sullivan, to recover from defendants something more than \$7,600, which it is claimed defendant fraudulently procured from the intestate before his death. Another was a proceeding instituted by petition filed by defendant Kittie Kenney for the probate of the will of John Sullivan, based upon the original probate thereof in the state of California. Objections were filed by plaintiffs to the probate of this will. After issues joined in each of these cases a stipulation was entered into, whereby they were tried to the court at the same time and upon the same testimony, so far as applicable. Upon trial to the court the objections ✓ to the probate of the will were sustained, and judgments and decrees were entered for the plaintiffs in the other two cases substantially as prayed in the petitions. Defendants Kenney and Kenney appeal. *Affirmed.*

*Clark & Hutchinson, McClain & Campbell, and Clements & Arnold, for appellants.*

*E. J. Salmon, E. M. S. McLaughlin, and A. H. Brous, for appellees.*

DEEMER, C. J.—John Sullivan died in Ontario, Cal., October 3, 1907, at the age of eighty years. He was the father of three children; to wit, Hugh Sullivan, plaintiff, a son, Kittie Kenney, defendant, a daughter, and a daughter deceased at the time of his death, who left surviving two minor children, Daisie V. and John M. Orton, plaintiffs herein. Defendant E. N. Kenney is the husband of Kittie Kenney. For many years prior to his death, if not at the time thereof, John Sullivan had been a resident of Jasper County, in this state. By habits of industry and thrift he became the owner of five hundred and seventy-two acres of land in this county, most of which was purchased during the years 1866 and 1867. Some

five or six years prior to his death he purchased an orange ranch in the state of California. In January of the year 1906 Sullivan was stricken with a severe illness, which lasted several months, and from which he never entirely recovered. At that time defendants were living in California, and, being advised of the father's sickness, Mrs. Kenney came to Iowa in the month of April of that year, and remained something like three weeks, when she returned to California. She again returned to Iowa in September of that year; her husband accompanying her on this trip. At this time John Sullivan was residing with his son Hugh on one hundred and sixty acres of land near Prairie City, in Jasper County, which was called the home farm. At that time the most friendly and kindly relations existed between the parties who are engaged in this controversy, and, so far as known, between John Sullivan and all of his relatives. On October 25, 1906, John Sullivan executed a warranty deed to his daughter, Kittie Kenney, of the orange ranch in California; the deed reciting a consideration of \$15,000, although as a matter of fact nothing was paid. On October 22, 1906, the defendants and John Sullivan appeared at a bank in Prairie City, and Mrs. Kenney told the cashier that her father wished to deposit \$7,000 to the credit of herself and husband. Six \$1,000 bills and two checks of \$500 each were then taken from the pocket of John Sullivan, delivered to the banker, and \$7,000 placed upon the books of the bank to the credit of the defendants. Several days thereafter Hugh Sullivan, plaintiff, learned of the transaction at the bank, and he immediately filed a petition for the appointment of a guardian of his father, whom he claimed was then of unsound mind. Hugh was thereupon appointed temporary guardian of his father and of his property. Notice of the application was then served upon John Sullivan. As soon as the notice was served, defendant Kittie Kenney informed her brother Hugh that the



father would not return to Hugh's home, and she thereupon took her father to a private boarding house in Prairie City, and kept him there for four or five weeks. He was then taken to a farm where he lived for a few weeks, and until just before the time set for the hearing of the guardianship proceedings, when he was taken to a boarding house in the city of Newton. Negotiations were entered into between the parties for the settlement and dismissal of the guardianship proceedings, and it is claimed that at the urgent solicitation of the defendants and upon their promise to return all the money and property which they had received from John Sullivan, and to take him back to Hugh's home, the guardianship proceedings were dismissed. Within a very short time after the dismissal of these proceedings John Sullivan, in consideration of mutual love and affection, made a deed to defendant Kittie Kenney for the five hundred and seventy-two acres of land in Jasper County. This deed was executed December 8, 1906, but was not filed for record until the 24th. It is claimed that, as soon as this deed was executed, Kittie Kenney and her husband surreptitiously took the old man from the Ellers' boarding house to the private home of one R. C. Daly in Newton, kept him there over night, and stealthily took an early train the next morning for California, taking John Sullivan with them, and keeping him there in close custody until his death. Within a day or two after the recording of this deed, Hugh Sullivan's attorney discovered the fact, and at once reported the matter to Hugh, and thereupon another action was instituted in the Jasper County district court for the appointment of a guardian for the person and property of John Sullivan. Petition being filed, Hugh Sullivan was appointed temporary guardian and duly qualified as such. He was also authorized as such guardian to institute the necessary proceedings to recover the property which testator had deeded and transferred to defendants. He almost imme-

diately brought the first action named in the statement of this case to set aside the conveyance of the Jasper County land. Notice of the guardianship proceedings was personally served upon John Sullivan in the state of California, and of the other action upon the defendants in the same state. These two actions were continued or postponed for one reason or another, generally upon defendants' motion until the death of John Sullivan. Hugh had no notice of his father's death until informed by some stranger that the body was enroute from California to Prairie City for burial. He thereupon assisted in arranging for the funeral, and, after the interment, he was appointed administrator of the father's estate by the district court of Jasper County, and on October 10th brought action in the same county against the defendants for the money which it is claimed was fraudulently procured by defendants from the father before his death. In each of these actions it was claimed that John Sullivan was unsound of mind and incapable of making deeds or transferring his property, and that the deeds and transfers hitherto mentioned were obtained by the defendants through fraud and undue influence practiced by them upon the deceased, and they asked that the deeds and transfers be set aside, that judgment be rendered for the amount of personal property received by defendants from the deceased, that partition be had of all the real estate whether in this state or in California, that defendants make an accounting of the rents and profits of all the real estate, and for general equitable relief. And the administrator in his action asked to recover all the money and personal property turned over to the defendants or either of them by the deceased during his lifetime.

Defendants denied the alleged mental incapacity of Sullivan, and also specifically denied all fraud and undue influence. Pending the hearing of these actions Kittie Kenney, as proponent, filed in the district court of Jasper

County a petition for the admission to probate in said court of an alleged foreign will of John Sullivan, bearing date July 10, 1907, which it is claimed was duly admitted to probate by the proper court of California. This application was made under section 3294 of the Code. Plaintiffs herein filed objections to the probate thereof, and these objections were sustained and exception taken. Leave was given to proponent to amend. This she did, and plaintiffs again filed objections and motion to strike. In this situation the parties filed the following stipulation: "It is hereby stipulated that cases Nos. 99 and 7,380 be, and they are, consolidated with this action, to be tried at the same time and upon the same evidence, so far as material; and it is agreed that the same were thus tried to the court."

It is contended that from the time of John Sullivan's sickness in January, 1906, down to the time of his death, he was unsound of mind and mentally incapable of doing any business; that the transfers of money and property made by him to defendants were fraudulent both in fact and in law, and that they were compassed and brought about by and through the fraud and undue influence of the defendants; that defendants then had charge of John Sullivan, who was weak of mind and body, and susceptible to their influence; that they gained his confidence, and were in such relations to him that they could not take conveyances or transfers from him except upon a showing of good faith and fair dealing. It is also claimed that John Sullivan did not go to California of his own volition; that he never changed his residence but was always domiciled in Jasper County; that he was taken in an almost helpless condition and surreptitiously by defendants from Iowa to California; and that he never gained a legal residence or domicile in the latter state. This testimony was introduced to show that the probate court of California had no jurisdiction to probate the alleged will of

John Sullivan. It is also contended that at the time of the making of the alleged will Sullivan was unsound of mind and incapable of making such an instrument, and that it too was procured by the fraud and undue influence of the defendants. The lower court sustained practically all of plaintiff's contentions, and in a general way granted the prayers of their petitions. It also refused to probate the foreign will. It did not order the partition of the California property, but, it appearing that the ranch had been sold after action brought and before trial, it rendered judgment for two-thirds of the proceeds thereof against the defendants, they being entitled to one-third thereof, according to plaintiffs' theory, because of the kinship of Mrs. Kenney.

Upon the fact questions presented a large amount of testimony was taken pro and con, and, as usual in such cases, it is very conflicting and some of it quite unsatisfactory. It is impossible to reconcile it on the theory that all of the witnesses have spoken the truth, and, to get at the real facts, we shall be obliged to use the rules and tests resorted to by courts and judges for arriving at a correct solution of the issues presented. Some interlocutory rulings are complained of, and there is a wide difference of opinion among counsel regarding some of the legal propositions involved. We shall first dispose of some of the preliminary rulings of the trial court.

I. Appellants filed a motion to strike certain counts from plaintiff's original petition. These counts were based upon the transfer of the money by John Sullivan to defendants in this state as before indicated.

1. Actions: It is claimed that these were improperly  
misjoinder of legal and equitable  
causes: joined with the equitable action to set aside  
waiver of error. the conveyances of the land; one action  
being at law and the other in equity. Again, it is said  
that an action to recover money can not be joined with  
an action of partition. For the purposes of the case we

may assume that this motion should have been sustained, and that the ruling of the trial court thereon was erroneous. But, as thereafter an action to recover this identical money was brought by the administrator of Sullivan's estate, which action was consolidated with the others and tried to the court by agreement, defendants waived the error, and can not be heard to complain thereof. At no time did defendants move to transfer this case or the issues relating to the personal property to the law docket for trial, and, as all claim to the personalty was waived save in so far as the administrator was concerned, defendants are in no position to complain of the forum in which the case was heard. *Browne v. Hickie*, 68 Iowa, 330; *Scribner v. Taggart*, 123 Iowa, 321.

II. The trial court denied the probate of the foreign will largely, if not wholly, because the proceedings of the court of California were not properly authenticated. Objections were presented to the first petition on these general grounds and they were held sufficient. Proponent was then given time to amend the certificates, etc., and this she did. Thereupon objections were again filed, and the case was submitted, as we understand it, with these objections on file, but undisposed of. Exception was taken to the first ruling; but proponent pleaded over and attempted to meet these objections. Under previous holdings this would seem to be a waiver of the error if there was one. *Smith v. Powell*, 55 Iowa, 215; *Frick v. Kabaker*, 116 Iowa, 494; *Geiser Mfg. Co. v. Krogman*, 111 Iowa, 503; *Frum v. Kenney*, 109 Iowa, 393; *Red-head v. Bank*, 123 Iowa, 336.

To properly decide the question here presented, we must have before us some state and federal statutes. Section 3294 of the Code reads as follows:

A will probated in any other state or county shall

a. WILLS:  
probate of  
foreign wills:  
authentication  
of proceedings:  
objections: waiver.

be admitted to probate in this state without the notice required in the case of domestic wills, on the production of a copy thereof and of the original record of probate, authenticated by the attestation of the clerk of the court in which such probate was made, or, if there be no clerk, by the attestation of the judge thereof, and the seal of office of such officers, if they have a seal.

Section 3296 reads in this wise:

Wills, foreign or domestic, shall not be carried into effect until admitted to probate as hereinbefore provided, and such probate shall be conclusive as to the due execution thereof, until set aside by an original or appellate proceeding.

Section 4645 of the Code provides:

That (a judicial record) of another state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of a judge, chief justice or presiding magistrate that the attestation is in due form of law.

And section 905 of the Revised Statutes of the United States reads as follows:

The acts of the Legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.

It is not necessary that the proof correspond with the federal statute provided the state is content with some other showing. See, *Willock v. Wilson*, 178 Mass. 68 (59 N. E. 757); *Wells v. Davis*, 105 N. Y. 670 (12 N. E. 42); *Hewitt v. Bank*, 64 Neb. 463 (90 N. W. 250, 92 N. W. 741); *Title Co. v. Potteries Co.*, 56 N. J. Eq. 441 (38 Atl. 422.) While the state can not add additional requirement, it may provide for less. *Ritchie v. Carpenter*, 2 Wash. St. 512 (28 Pac. 380, 26 Am. St. Rep. 877).

For appellant it is insisted that the record was properly authenticated; that, under the rule requiring full faith and credit to be given the probate of the foreign will, that probate became absolute and can not be challenged upon any ground, particularly because of the mental unsoundness of the testator or of undue influence. It is also argued that, as the California court found expressly that it had jurisdiction, and that John Sullivan was a resident of California and domiciled there, these questions can not now be considered, but are concluded by the findings. Relying, then, upon this will, which left plaintiffs nothing, they say that the case was wrongly decided. As much depends upon the authentication of the record of the California courts, we here set out the authentications thereof. As first presented they read as follows:

State of California, County of San Bernardino—ss.: I, Charles Post, county clerk and ex officio clerk of the superior court of said county, do hereby certify the foregoing to be full, true, and correct copies, respectively, of the petition of Kitty Sullivan Kenney for letters testamentary; order, by clerk, fixing time; affidavit of publication of notice of probate of will; certificate of proof of will and the facts found; will of John Sullivan, deceased; order admitting will to probate; letters testamentary, issued to Kitty Sullivan Kenney, in the matter of the estate of John Sullivan, deceased; and I further certify

that I am the legal keeper of all of said original documents, and that I have carefully compared all of said copies with the originals thereof, which said originals are on file in my office. It witness whereof, I have hereunto set my hand and affixed my official seal this 4th day of December, 1907. Charles Post, Clerk. [Seal of Superior Court, San Bernardino County, Cal.]

I, Frank F. Oster, presiding judge of the superior court of the county of San Bernardino, state of California, hereby certify that Charles Post, whose genuine signature is annexed to the above certificate, was at the date thereof the clerk of said court, and that the official acts and doings of said Charles Post as said clerk are entitled to full faith and credit, and that the foregoing attestation of said clerk is in due form, and that said clerk is the legal keeper of the documents referred to in said certificate. Witness my hand and the seal of said court this 4th day of December, 1907. Frank F. Oster, Judge of the Superior Court. [Seal of Superior Court, San Bernardino County, Cal.]

State of California, County of San Bernardino—ss. I, Charles Post, county clerk and ex officio clerk of the superior court of said county, do hereby certify that Frank F. Oster, whose genuine signature is subscribed to the last foregoing certificate, was at the date thereof, and now is, the presiding judge of said superior court, and is duly commissioned and qualified. In witness whereof, I have hereunto set my hand and affixed my official seal this 4th day of December, 1907. Charles Post, Clerk. [Seal of Superior Court, San Bernardino County, Cal.]

The amended certificate reads thus:

State of California, County of San Bernardino—ss.: I, Charles Post, hereby certify that I am the duly elected, qualified and acting clerk of the superior court of San Bernardino County, California. That the superior court of San Bernardino County, California, under the laws of the state of California, is the court of probate, and has jurisdiction of the probate of wills and the settlement of estates in the state of California. That hereto attached is a full, true, and complete copy of the last will and testament



of John Sullivan, deceased, and also a full, true, and complete copy of the original record of the probate of said will, as they appear in the office of the clerk of the superior court of San Bernardino County, California. I hereby further certify that the original will, a true copy of which is hereto attached, and the original record of probate, true copies of which are hereto attached, are now on file in my office, the same being the office of the superior court in and for San Bernardino County, California. And I further certify that said will and the probate thereof was had in the superior court of San Bernardino County, California. I hereby further certify that F. F. Oster is the duly elected, qualified and acting judge of the superior court of San Bernardino County, California. Charles Post, Clerk of the Superior Court of San Bernardino County, California. [Seal of the Superior Court of San Bernardino County, California.]

Attached to the foregoing is the following certificate of presiding judge:

State of California, County of San Bernardino, ss.: I, F. F. Oster, hereby certify that I am the duly elected, qualified, and acting judge of the superior court in and for San Bernardino County, California. That the superior court of California has original, full, and complete jurisdiction of all matters in probate, including the probate of wills, and that the superior court of San Bernardino County, California, has original, full, and complete jurisdiction of all probate matter in San Bernardino County, California, including the probate of wills and had original full and complete jurisdiction to probate the will of John Sullivan, deceased. That the clerk of the superior court of San Bernardino County, California, has charge, in his official capacity, of all original wills and all original records of all probate matters and proceedings. And I further certify that Charles Post is the duly elected, qualified, and acting clerk of the superior court of San Bernardino County, California, and that the seal attached is the seal of said superior court of San Bernardino County, California. Frank F. Oster, Judge of the Superior Court of San Bernardino County, Cal. [Seal of the Superior Court of San Bernardino County, California.]

*In re will of Margaret J. Capper*, 85 Iowa, 87, it is said: "Under the statute, it is required, in order that a foreign will be admitted to probate in this state, first, that a copy of the will be produced; second, <sup>4. WILLS: probate of foreign will: authentication.</sup> that a copy of the original record of probate be produced; third, that both be authenticated by the attestation of the clerk of the court in which probate was made; fourth, that the seal of the office or officer be attached, if they have a seal; fifth, that, if there be no clerk, authentication must be made by the attestation of the judge." Tried by this standard it seems to us that the requirements of the statute (Code, section 3294) and of the law as announced in the foregoing opinion were fully met, and that the foreign will should have been admitted to probate here unless it be, as contended by appellees, that the California court did not have jurisdiction to probate the will. It is well to state in this connection that the will itself was not offered for probate in this state; hence we have nothing to do with the question as to whether or not it should have been probated as a domestic will.

It is contended for appellants that, as the California court assumed jurisdiction and expressly found that it had it by recitals in the order of probate, this finding was and is conclusive, and that it is not <sup>5. SAME: jurisdiction.</sup> permissible to prove, when attempt is made to probate the instrument as a foreign will, that the court admitting it to probate had no jurisdiction of the matter either because the testator was incompetent to make a will, had been unduly influenced in the making thereof, or was not, when he died, domiciled in the state where his will was probated. Mental incapacity or undue influence do not, of course, go directly to the question of jurisdiction. His soundness of mind may, however, be considered upon the question of change of domicile, and is often of supreme and vital importance. To defeat this jurisdiction of the

California court, it must be shown that testator, Sullivan, was not legally domiciled in California at the time of his death.

Going now to the main legal proposition here involved, it will be found that a number of courts sustain the views expressed for appellant and hold that a foreign judgment cannot be attacked for want of jurisdiction

6. SAME.

where the foreign court expressly finds that jurisdiction does exist. But that is not the rule in this state, nor is it the one sustained by the greater weight of authority. *Kline v. Kline*, 57 Iowa, 386; *In re Williams' Estate*, 130 Iowa, 553; *In re King*, 105 Iowa, 320; *Neff v. Beauchamp*, 74 Iowa, 92; *Cooley v. Barker*, 122 Iowa, 440; *Pollard v. Baldwin*, 22 Iowa, 328; *State v. Fleak*, 54 Iowa, 429; *O'Rourke v. Railroad*, 55 Iowa, 332; *Harshey v. Blackmarr*, 20 Iowa, 161. See, also, *Scripps v. Durfee*, 131 Mich. 265 (90 N. W. 1061, 100 Am. St. Rep. 614); *Pennywit v. Foote*, 27 Ohio St. 600 (22 Am. Rep. 351); *Dunstan v. Higgins*, 138 N. Y. 70 (33 N. E. 729, 20 L. R. A. 668, 34 Am. St. Rep. 431), and note. The will itself was not, as we understand it, offered for original probate as a domestic will or as a foreign will offered for probate, because of the presence of property in this jurisdiction, so that with these questions we have nothing to do. Appellees' counsel say, however, that, even had it been so offered, it should not be admitted to probate for the reason that, when executed, testator was incompetent mentally to make it, and for the further reason that it was procured by fraud and undue influence. As to these matters of fact, we shall have more to say hereafter.

That the original will must be produced for probate if claim is made that it is entitled to probate as a domestic will, see *Bowen v. Johnson*, 5 R. I. 112 (73 Am. Dec. 49). Appellees claim that the California court was without jurisdiction, for the reason that John Sullivan was

not domiciled in California at the time of his death; that he did not, when he moved to California or was taken there, have sufficient mental capacity to choose his domicile; that he did not go to California or remain there with the intention of making that place his home; and that at the time of the making of the will he was unsound of mind, and that the will was procured through fraud and undue influence.

7. SAME: probate: production of original will.

Having now disposed of the primary legal questions we are brought down to the propositions of fact upon which the decision must turn. Appellees contend that the deeds

8. FRAUDULENT CONVEYANCES: trust and confidence: undue influence: presumption: burden of proof.

to the California and the Iowa lands and the transfer of the personal property, money, etc., were invalid and of no effect because of the mental incapacity of the grantor, John Sullivan, and for the further reason

that these gifts, conveyances, and transfers were procured through fraud and by reason of undue influence brought to bear upon said Sullivan by the defendants in this case. As a legal proposition, appellees contend that as defendants occupied a confidential relation to deceased, and during that time received conveyances of his entire property, these conveyances are presumptively fraudulent. They rely upon *Ikerd v. Beavers*, 106 Ind. 483 (7 N. E. 326); *Fishburne v. Ferguson*, 84 Va. 87 (4 S. E. 575); *Ross v. Conway*, 92 Cal. 632 (28 Pac. 785.) In the latter case it is said:

The rule is inflexible that no one who holds a confidential relation towards another shall take advantage of that relation in favor of himself, or deal with the other upon the terms of his own making, that in every such transaction between persons standing in that relation the law will presume that he who held an influence over the other exercised it unduly to his own advantage; or, in the words of Lord Langdale, in *Casborne v. Barsham*, 2 Beaver, 78, the inequality between the transacting parties is so great 'that, without proof of the exercise of power

beyond that which may be inferred from the nature of the transaction itself, this court will impute an exercise of undue influence; that the transaction will not be upheld unless it shall be shown that such other had independent advice, and that his act was not only the result of his own volition, but that he both understood the act he was doing and comprehended its result and effect.' This rule finds its application with peculiar force in a case where the effect of the transaction is to divest an estate from those who, by the ties of nature, would be its natural recipients, to the person through whose influence the diversion is made.

See, also, *Spargur v. Hall*, 62 Iowa, 498. From this last case we quote as follows:

An important consideration in determining this case is the relation which is shown to have existed between Mary Spargur and her daughter, the defendant. The relation of confidence and trust reposed in the defendant by her mother is clearly shown by the fact that she took her daughter into her home, and relied upon her as her helper and support in her old age and infirmity. Contracts made between persons sustaining these relations of trust and confidence, where it appears that the stronger and controlling mind has obtained a conveyance of property or an obligation to pay money, are jealously watched and guarded by courts of equity, and set aside, unless the beneficiary shows the *bona fides* of the transaction. Keer on Fraud and Mistake, 150-152; *Leighton v. Orr*, 44 Iowa, 679; *Tucke v. Buchholz*, 43 Iowa, 415.

Reference is also made to *Paulus v. Reed*, 121 Iowa, 227; *Schneider v. Schneider*, 125 Iowa, 1; *Fitch v. Reiser*, 79 Iowa, 34, and *Earhart v. Holmes*, 97 Iowa, 649, for an announcement of the same proposition. We also quote the following from *Mott v. Mott*, 49 N. J. Eq. 199 (22 Atl. 1000):

With reference to transactions between parent and child, the law presumes that the influence of the parent

over the child during the tender years of infancy is so controlling that it regards transfers from the child to the parent on arriving at majority, or immediately thereafter, as having been made under the influence of overweening confidence. As the child matures, and acquires experience and independence, the presumption weakens, and at last ceases. As the parent, however, advances in years, the dependence may be reversed by the hand of time. If life draws to a close with a failing intelligence and enfeebled frame, the parent naturally looks with confidence to a son or daughter for advice and protection. The parent becomes the child 'with the same dependence, overweening confidence, and implicit acquiescence, which had made the other, in infancy, the willing instrument of a parent's desires. *Highberger v. Stiffler*, 21 Md. 338 (83 Am. Dec. 593); *Martin v. Martin*, 1 Heisk (Tenn.) 653; *Brice v. Brice*, 5 Barb. (N. Y.) 533; *Comstock v. Comstock*, 57 Barb. (N. Y.) 453; *Whelan v. Whelan*, 3 Cow. (N. Y.) 537. If, under such circumstances, a son obtains a conveyance from a parent, this court will not permit it to stand unless such son establishes by abundant proof that the contract was not only free, but fair, and made with the utmost good faith.

While not absolutely controlling, this rule as to presumptions and the burden of proof seems to be well established. But appellants insist that it does not apply to the instant case, for the reason that the record does not disclose such a situation as warrants it.

Counsel contend that, under the facts, the burden was upon plaintiff to show mental incapacity, fraud, or undue influence. They further contend that, under the record,

the burden was upon appellees to show that

9. WILLS:  
probate: bur-  
den of proof.

testator was not domiciled in California at the time he died, and that the will should

not have been admitted to probate because of mental incapacity and undue influence. While appellees insist that as testator's last domicile is proved to have been in Jasper County, defendants have the burden of proving that testator changed it to California before he died. In

this connection we may say that, as the will was probated in California, the burden is upon appellees to show that the court admitting it to probate was without jurisdiction, and this involves an affirmative showing that testator was not domiciled in California when he died. Here we may also state that it is strenuously contended for appellants that the Jasper County court was without jurisdiction to do anything with the California real estate. As to this, more hereafter.

There can be no doubt that early in the year 1906 John Sullivan had a very severe spell of sickness which left him quite weak mentally and physically, and it is also admitted that, before he recovered from that illness, if he ever did, and while his daughter and her husband, defendants herein, were in Iowa, deceased made a conveyance of his California land to the daughter, and that a few days prior thereto he transferred to defendant E. N. Kenney, and there was placed to his (Kenney's) credit in a bank, something like \$7,000. Knowledge of the bank transaction having been brought home to Hugh Sullivan, he immediately commenced guardianship proceedings herein, before referred to. The transfer of the money started the controversy between the children of the deceased which finally culminated in these actions in court. By agreement of defendants and their attorneys it was finally arranged that Hugh Sullivan would dismiss the guardianship proceedings and defendants agreed to turn back to John Sullivan the money they had received from him. The dismissal was thereupon entered, but neither the lands nor the money was returned to John Sullivan; on the contrary and within a very short time after the dismissal, defendants secured a conveyance from John Sullivan of the five hundred and seventy-two acres of land in Jasper County in consideration of natural love and affection, which conveyance was withheld from record until December

10. FRAUDULENT  
CONVEYANCES:  
undue influ-  
ence: evidence.

24, 1906. On the day when the deed to the Jasper County land was made and as a part of the same transaction defendant Kittie Kenney signed the following contract:

Contract made and entered into by and between John Sullivan and Kittie Kenney, his daughter, this 8th day of December, 1906. Whereas, said John Sullivan has this day given and conveyed to his said daughter about five hundred and seventy-two acres of land located in the township of Des Moines, Fairview and Mound Prairie, in Jasper County, Iowa, now this certifies, that it was the intention of said John Sullivan in said conveyance to reserve the income from said land during his lifetime, and the said Kittie Kenney hereby agrees that she will annually hereafter on the 31st of December of each year, commencing on the 31st day of December, 1907, pay over to her said father, the said John Sullivan, all sums that she shall have received from said lands as rental therefor for the previous year, less the actual expense of looking after renting said lands and collecting such rentals.

This contract was not acknowledged, nor was it recorded, and it first appeared when produced by Mrs. Kenney on the trial of this case. Before the recording of this deed, defendants took John Sullivan from the place where he was then boarding in Newton to a private house, kept him there until the next morning, and then took him in a wheel chair to the depot, where they boarded a train, and took him to their home in California, where he lived until his death. In California he was constantly attended by trained nurses until his death, and while there he transacted no business on his own account. Almost immediately upon the recording of this last deed, Hugh Sullivan commenced the second guardianship proceedings which we have heretofore referred to. Although without any property to dispose of, it is claimed that John Sullivan made the will which was admitted to probate in California. This will purports to have been executed on



July 10, 1907, and testator died on October 3d of the same year. It is admitted that testator had a paralytic stroke on July 30, 1907, and that thereafter he was a physical and mental wreck, having no capacity to make a will or contract. Indeed, the witnesses practically agree that after July 30th, and until his death in October, 1907, testator was in a state of idiotic dementia. The second guardianship proceedings were never brought to trial, largely, as before stated, because of continuances obtained for and on behalf of testator or those representing him. After these proceedings had been commenced, and after the death of her father, Kittie Kenney sold the California real estate for something like \$18,000.

These are some of the sidelights upon the case, and it is manifest that for one reason or another defendants claim to be the owners of all of testator's property, to the exclusion of his other heirs. There seems to have been no trouble between Hugh and his father until Mrs. Kenney obtained the money and had it deposited to her husband's credit, and Hugh began the guardianship proceedings. Claim is made that the bringing of these proceedings instigated the feeling which it is contended thereafter existed between the testator and the plaintiffs in this case. Properly presented by the defendants, these might very easily have been made the means whereby to poison the testator's mind against his heirs living in Iowa. We have gone over this long record many times and with care because of the amount involved, and are constrained to hold that at the time the transfers of property and money were made to defendants John Sullivan was mentally incompetent to make them. The nature of John Sullivan's illness in the early part of the year 1906, the accompanying symptoms, the delirium which accompanied the disease, and the state of his mind and body indicated not only a physical, but a mental, break-

down. During this time Sullivan was irrational, imagined that he saw snakes, did not realize where he was, wanted to be taken home, although at that time he was at the only home he had, used foul, obscene and vulgar language, and, as he grew somewhat better, was guilty of the solitary vice. He never fully recovered from this illness; on the other hand, he seemed possessed of delusions, among other things, although well to do, he thought he was going to the poorhouse, and, although there was nothing to justify it, thought, and often asserted to others, that Hugh Sullivan's wife was unchaste, and that she was having clandestine meetings with men other than her husband. There was a hardening of the arteries, tremor, and a loss of the powers of locomotion. His memory became affected, and he failed to recognize his most familiar acquaintances, frequently repeated in his conversation, talked in a disconnected and incoherent manner, and never thereafter was able to take care of himself. When in health, he made no distinction between his children or their representatives, and always spoke of dividing his property on an equitable basis among them. He thought men who made wills were foolish; that he intended, when he died, to have his property divided equally among his children.

The money transaction at the bank when Kittie Kenney returned to Iowa the second time in the year 1906 is suspicious, and following almost immediately upon the secret transfer of the California orange ranch indicates the power which she had over her father. This is readily explained upon the theory that the old gentleman became possessed of the notion that his daughter-in-law was unchaste, that she was threatening to poison him, and would do so unless he were taken away from her home where he was then living. The return of the defendant Kittie Kenney with her husband from California to Iowa in

the early part of September, followed by transfers to them of the orange ranch in California, and of the money in the bank, is suspicious to say the least. These conveyances were entirely voluntary, and it also appears that at the very time the first guardianship proceedings were commenced defendants had taken John Sullivan to a bank in Prairie City and were there endeavoring to secure a loan of \$7,000 or \$8,000, proposing that John Sullivan would become surety for them. As soon as the notice of guardianship was served, defendants announced that deceased would not return to Hugh Sullivan's home, and he never did return there. He was taken to private boarding houses, and supported there either by Hugh or by the defendants until he was taken to California, after being taken from his regular boarding place and kept over night just prior to the departure for California. Deceased did not return to the Hugh Sullivan home for any of his clothing or other effects which were left there when he went or was taken to town and had made the transfer of the money in the bank. His intent to go to California at that particular time, if he had any, was not disclosed to any one, and defendants' purpose to take him there seems to have been carefully concealed. Before leaving, however, defendants secured a deed to the five hundred and seventy-two acres of land in Iowa, paying nothing whatever therefor, and thus acquired practically all of the property of the deceased. This, too, was kept secret until John Sullivan was safely on the way to California. The contemporaneous agreement for support was also carefully guarded from the public eye and never saw the light until the trial of these cases. So that in some manner defendants secured the title to all of decedent's property without paying anything therefor and without consideration, save as it be found in the secret agreement for support. Arriving in California, deceased became

somewhat better physically, and, although many witnesses say that his mentality appeared to be good for one of his age, it is significant that during the entire time he was in charge of trained nurses and never was left alone. It is conceded that he entirely collapsed, both mentally and physically, July 30, 1907, but the testimony with reference to this matter indicates that this was not a sudden unexpected matter. Indeed, the history of the case seems to indicate that testator was suffering from *senile dementia*, which finally passed to that state known as *paresis*.

That decedent was possessed of insane delusions at the time he made the conveyances in question we have no doubt, and that defendants by some means acquired great influence over him is just as certain. That they became skeptical of the validity of the conveyances and transfers is confirmed by their conduct after they reached California. Instead of being content to rely upon their conveyances, they induced Sullivan to make a will in which the deceased practically willed all his property to his daughter Kittie. This will was executed but twenty days before the testator's conceded collapse, and to this we shall hereafter make reference. True, a number of witnesses from California, including some experts, testified that in their opinion Sullivan was sound in mind while in California down to the day of his collapse in July of 1907; but none of this testimony meets the showing made by plaintiffs of testator's having hallucinations and insane delusions at the time the conveyances and transfers were made. It is well known that one may be so afflicted, and yet not show it unless their minds are directed to the subject-matter thereof. Some of the experts in California testified that John Sullivan had few, if any, symptoms of *senile dementia*; but they are disputed by experts who attended upon him here in Iowa. Unfortunately

for the cause of truth, we rarely find experts agreeing in such cases. Such situations are discreditable to a learned and honorable profession, and suggest that oftentimes opinions are colored to meet the exigencies of the case. Some solution of this problem must be found or medical expert testimony might almost as well be discarded. Testator never transacted any business after going to California, save to make the will to which we have hitherto referred. He was closely watched, and was constantly attended by nurses. He was present when depositions were being taken for the trial of some of these cases, but was not examined as a witness, and gave no heed to what was transpiring in his presence. Without stating more of the record, for this opinion has already outgrown proper bounds, we are constrained to hold that, when the conveyances and transfers in question were made, Sullivan was possessed of insane delusions and hallucinations that affected his mental processes, and that, owing to the condition of his mind, it became easy for defendants to secure the conveyances which they did through the influence they had over the deceased.

As to the will we are of opinion that it was obtained through fraud and undue influence easily exerted because of the proceedings which had been instituted by Hugh

Sullivan for the appointment of a guardian  
11. WILLS: un-  
due influence: and to set aside the various conveyances  
evidence. and transfers.

Deceased became absolutely dependent upon defendants after they secured his confidence while here in Iowa. He was supplied by them with nurses and with all the necessities and conveniences of life, and it is not difficult to understand what influenced him to make the will. After considering the whole record, we are satisfied that deceased was mentally unsound from the time of his attack in the year 1906. His delusions were such as to cause him to do the things he did and

to forget his former intentions and purposes in the disposition of his property. Thinking that his son's wife was unchaste, that she intended to and would poison him, becoming enraged at his son for bringing the guardianship proceedings, it was easy to secure the transfers in question.

We are also of opinion that the trial court was justified in finding that deceased never voluntarily and intentionally changed his domicile. Defendants could not do this for him, and, without sufficient mind and volition to acquire a new domicile himself, no one else could do so for him. This is so elementary that no decisions need be cited in support thereof. Upon this question of fact arising in the case for the probate of the foreign will, the conclusion of the trial court upon a conflict in the testimony is conclusive. Having no domicile in California, the courts of that state had no jurisdiction to probate the will and the proceedings of the California courts in admitting the same to probate must be disregarded. Were we to admit the will on the theory that the California court had jurisdiction, we should nevertheless be compelled to hold that the trial court committed no prejudicial error in denying probate in this state, for the reason that in our opinion this will was procured through undue influence, and should be set aside for that reason alone. Indeed, we are of opinion that testator did not have capacity to make a will after his attack in January of the year 1906. But these propositions need not be definitely decided at this time. The so-called sidelights to which we have referred during the course of this opinion are important, for they strongly confirm the conclusions reached.

II. The only other question which we need consider is the claim that the trial court had no jurisdiction over the California property in any of the actions now before us. Of course, courts of this state can not grant partition of lands lying in another jurisdiction, but they do

Don't  
know

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have jurisdiction over actions purely *in personam*. If any of these actions be to secure a conveyance of the California lands or to declare a trust therein, then the courts of this state do have jurisdiction, although the *res* may be in another commonwealth. This proposition is supported by the unbroken voice of authority. See *Barringer v. Ryder*, 119 Iowa, 121; *Epperly v. Ferguson*, 118 Iowa, 47; *MacGregor v. MacGregor*, 9 Iowa, 65; *Massie v. Watts*, 6 Cranch 148 (3 L. Ed. 181); *Monnett v. Turpie*, 132 Ind. 482 (32 N. E. 328); *King v. Pillow*, 90 Tenn. 287 (16 S. W. 469); *McGee v. Sweeney*, 84 Cal. 100 (23 Pac. 1117); *Noble v. Grandin*, 125 Mich. 383 (84 N. W. 465). While the actions were pending Kittie Kenney disposed of the California real estate, receiving \$18,000 in cash therefor. The proceeds of the land thus became personal property, but they partook of the nature of the real estate, and the fund can be followed into her hands, and disposed of by a court having jurisdiction of her person. *Farmers' Bank v. Kimball Co.*, 1 S. D. 388 (47 N. W. 402, 36 Am. St. Rep. 739); *Borchert v. Borchert*, 132 Wis. 593 (113 N. W. 35). No complaint is made of the decree dividing this property, and we shall take it for granted that the division was correct.

No other complaints are made of the orders and decrees, and finding them sustained by the law and the facts, they are each and all *affirmed*.

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CHARLES GUSTAFSON, Appellant, v. CEDAR RAPIDS &  
MARION CITY RAILWAY COMPANY.

**Street railways: CARRIAGE OF PASSENGERS: BREACH OF CONTRACT: DAMAGES.** Where a passenger upon a street car of his own volition left the car because it was not going to the end of the line as usual, and was thus compelled to walk some distance, his remedy

for failure to carry him the full distance, if any, was for breach of contract; but where, as in this case, there was no evidence of damage he was not entitled to recover; and even though he was entitled to nominal damages failure to allow the same is not ground for reversal.

*Appeal from Linn District Court.*—HON. F. O. ELLISON,  
Judge.

THURSDAY, MAY 12, 1910.

THE plaintiff appeals. *Affirmed.*

*Crosby & Fordyce*, for appellant.

*W. G. Clark* and *W. E. Steele*, for appellee.

LADD, J.—The Central Park line is one of defendant's street railways in Cedar Rapids. The plaintiff, with his wife, child, and sister-in-law boarded a car at Fifth Street and First Avenue with the purpose of riding to E Avenue and Sixteenth Street, the end of the line, near which he resided. He paid the fares of himself and those with him, but it does not appear how much this was. Upon reaching Sixteenth street, the car stopped, and plaintiff, noticing the motorman swinging the trolley around, asked if the car was going no farther, and was informed that such was the order of the conductor. The plaintiff then inquired of the conductor if that was as far as he was going, and the latter said: "If you are going to the circus, why don't you go the other way?" Being told that plaintiff wished to go to the end of the line, the conductor answered: "That is the accommodation I will give you to-day." Asked to stop the car so that those with plaintiff might get off, the conductor did so, saying, "Go ahead and get them off." When plaintiff, after informing those with him, said that he would "see about this," the con-



ductor responded, "Go ahead and see." According to the evidence in behalf of plaintiff, in making the last two remarks, the conductor appeared angry about something. The customary course of the car was along Sixteenth street to E avenue, five blocks further, and plaintiff was compelled to walk this distance, carrying the child, as was also his wife and sister-in-law. The two latter assigned their claims for damages to him. Upon proof of the foregoing facts, a verdict was directed for the defendant.

It will be observed that the plaintiff and his assignors were not ejected from the car, nor even requested to leave it, so that *Curtis v. Railway*, 87 Iowa, 622, and *Coine v. Railway*, 123 Iowa, 458, relied upon by appellant, are not in point. They merely asked to be let off because the car was not going, as was usual, to the end of the line. The conductor complied with the request, and they alighted in safety. His conversation was not discourteous, even though he may have appeared angry, and nothing whatever occurred to occasion humiliation on their part. Possibly there was a breach of contract in failing to carry them to the end of the line, but, if so, no evidence of damage was adduced. Even if, upon such breach, nominal damages should be allowed, as contended by appellant, this would not be ground of reversal. See cases collected in *Harvey v. Railway*, 129 Iowa, 465. No right other than that to damages was involved, so that the cause is not within the rule of that decision. There was no error. *Affirmed.*

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D. W. HASTINGS v. THE CHICAGO, ROCK ISLAND AND  
PACIFIC RAILWAY COMPANY, Appellant.

**Flood waters: OBSTRUCTION: UNPRECEDENTED RAINFALL: INSTRUCTION.**

- 1 In this action for flooding plaintiff's land by the obstruction of a creek defendant sought to show that it was the result of unprecedented rainfall, and there was evidence of high water in other

years. *Held*, that an instruction to the effect that although the water might have been as high many years ago on a single occasion that fact would not necessarily mean that the particular flood complained of was unprecedented, was properly refused.

**Same: MEASURE OF DAMAGES.** Where the evidence tends to show  
2 that the use of a farm as a whole is rendered more inconvenient and less profitable, because of the injury to some part thereof by flood water, the measure of damages is the difference in value of the entire farm immediately before and immediately after such injury, rather than the injury to the particular part of the land flooded.

**Railroad crossing: EASEMENT: RIGHT OF ADJOINING OWNER.** Permis-  
3 sion to use a trestlework as a driveway for teams and cattle will not entitle a land owner to have the same maintained as a private railroad undercrossing, no matter how long such use may have continued.

**Same: UNDERCROSSING: MAINTENANCE.** The assurance by a railroad  
4 company that a bridge will be so constructed as to permit the cattle of an adjoining owner to pass under it, is not a recognition of the statutory right to an undercrossing, nor an assurance that such a crossing will be maintained, but such a right amounts to no more than an easement; and while the railroad company can not obstruct the passage it need not maintain it, in the absence of an express agreement to that effect, but this duty devolves upon the land owner.

**Same.** A land owner who is privileged to use an archway under  
5 a railroad as a passage for cattle may rightfully go upon the right of way and remove an obstruction therein to the passage of surface water and of his cattle.

**Flood waters: OBSTRUCTION: DAMAGES.** Where a railroad company  
6 negligently fails to maintain a sufficient opening under its tracks for the passage of surface water, thus causing a deposit of sediment in the bed of the stream and in the passageway under the track, to the injury of an adjoining owner, the expense of clearing the opening would be an element of the adjoining owner's damage. But where the land owner sues for failure to keep the archway open as an independent cause of action he can not recover for depreciation in the rental value of his farm.

*Appeal from Davis District Court.*—HON. C. W. VER-  
MILLION, Judge.

FRIDAY, JUNE 10, 1910.

ACTION to recover damages to plaintiff's land and crops by flooding occasioned by the backing up of water in a stream due to the insufficiency of the opening left for the stream through defendant's railroad embankment, and also for damages caused to plaintiff by allowing a passageway for his cattle under defendant's track to become obstructed by the deposit of sediment. There was a general verdict for plaintiff in the sum of \$637, of which amount it appears by special finding the jury allowed \$300 on account of the obstruction of the cattle pass under defendant's track. From a judgment on the general verdict, defendant appeals. *Affirmed* on condition.

*Carroll Wright* and *J. L. Parrish*, for appellant.

*Payne & Goodson*, for appellee.

MCCLAINE, J.—The stream known as "Soap Creek" flows south across plaintiff's land and through a bridge in defendant's railroad embankment, which bridge had prior to the injury complained of been reconstructed so as to leave a smaller opening than before for the passage of water. As the result of very heavy rains in June, 1905, as plaintiff alleges and as his testimony tends to show, the water was backed up in Soap Creek by reason of the insufficiency of the opening through this bridge so as to flood a portion of plaintiff's land and cause it to be washed into gullies, rendering it less suitable for cultivation. At the same time the growing corn on about twenty-eight acres of his land was destroyed. Twenty-five hundred feet west of the bridge above referred to is another bridge or culvert under defendant's track, through which a small stream flows to the northward emptying into Soap Creek above the bridge over that creek. When the railroad

embankment was first constructed there was trestlework over this small stream in two or three spans, through one of which by defendant's permission plaintiff allowed his cattle to pass from the land which he occupied north of the track to other land used as a part of the same farm which was south of the track. In 1895 the defendant commenced to replace this trestlework with a stone bridge or culvert of but one opening, and plaintiff then notified the defendant that the opening which he had been using through the trestlework for the purpose of driving through it with teams and having his stock pass through it from one portion of his land to the other was necessary to him in the convenient use of his farm, and that he claimed a right to a good and sufficient underpass for stock and a good wagon road sufficiently wide to permit the hauling of hay, fodder, and other crops, and that, if defendant failed to keep and maintain such passway and wagon road, he would begin proceedings to compel defendant to keep and maintain the same. Soon afterward he wrote to an officer of the defendant that a passway put through the arch which defendant was constructing would be impassable a large portion of the year on account of the flow of water and its freezing during winter so that it would be impassable for stock, and suggested that a different passway be provided for him. In response to this letter he was assured by the official that the company expected to leave him something there that would be all right for cattle to pass, and that it would put in necessary paving. Later the plaintiff again wrote to the officer of the defendant company that the opening left under the bridge in question was impassable for stock on account of quicksand at the approach to the arch, and that, if it was the purpose of the company to force a crossing there, it must be on account of unfamiliarity with the place, as it could not be made passable except in dry times during summer, and not at all in winter. Thereupon the officer assured

him that the bottom of the culvert would be paved with rock, and so arranged that cattle could get through. Ten years later an officer of the defendant company, in response to some complaint about the obstruction of the passway, assured the plaintiff that the section foreman had instructions to clean out the cattle pass, and that it would be done in a few days. The evidence for plaintiff tends to show that in August, 1904, the opening had become somewhat obstructed by the deposit of sediment at the north end, and that after the flood of 1905 it was half filled with sediment, so that cattle could not pass through. The deposit of sediment was, however, not alone in the opening, but also in the little valley of the stream extending northward about one hundred and fifty feet through plaintiff's land. The only complaint which appears to have been made to the defendant was that in response to which the letter above referred to promising the cleaning out of the sediment was written.

I. Defendant sought to show that the rainfall occasioning the flood in June, 1905, was unprecedented, for the purpose of escaping liability on the ground that it was not bound to anticipate and make provision for such a flood. There was testimony for plaintiff that in 1868 there was a flood during which the water got higher in the Soap

1. FLOOD WATERS:  
obstruction:  
unprecedented  
rainfall:  
instruction.

Creek bottom than in 1905. The court gave a general instruction on the subject, the correctness of which is not questioned, but defendant asked a specific instruction to the effect that even though the water in the creek may have been as high as in 1905 many years ago on one occasion, that fact would not of itself necessarily mean that the flood of 1905 was not unprecedented. We do not think there was any error in refusing this instruction. There was evidence as to very high water in other years, and it was not necessary to single out one particular previous flood, and say that the occurrence of such a flood would not show that the

flood of 1905 was such as that it need not have been anticipated by defendant.

II. Complaint is made of an instruction with reference to the claim for damages caused by injuries to plaintiff's land and crops on account of the flood of 1905, on

the ground that the jury was authorized  
 2. SAME: measure of damages. by such instruction to allow the difference between the fair market value of plaintiff's farm as it was immediately before such injury and its corresponding value immediately thereafter so far as such value was diminished or decreased. The ground of objection is that the estimate of damage should have been limited to the depreciation in value of the particular land involved in the flood. But the evidence tended to show that the use of the farm as a whole was rendered more inconvenient and less profitable on account of the injury to this particular land which was washed into gullies, and made unsuitable for use in the raising of crops. Under such circumstances, it is a well-settled rule in this state that the damages to the whole farm may be estimated together. *Bennett v. City of Marion*, 119 Iowa, 473; *Parrott v. Chicago G. W. R. Co.*, 127 Iowa, 419; *Harvey v. Mason City & F. D. R. Co.*, 129 Iowa, 465.

III. In various ways the defendant raised the question whether under the evidence it was liable in damages for the injury to plaintiff resulting from the obstruction

by sediment of the crossing under the track  
 3. RAILROAD CROSSING: easement: right of adjoining owner. through the stone arch or culvert; the contention being that plaintiff had a mere license or easement which he could make use of as he saw fit, but must keep in repair, while the claim for plaintiff is that this undercrossing was a private crossing furnished by defendant to plaintiff as the owner of land on both sides of its railway as contemplated in Code, section 2022, and which by the provisions of that section the defendant was bound to keep in good repair.

We find nothing in the record to indicate that the passageway through this stone arch was a private crossing furnished to the plaintiff by defendant in pursuance of any statutory duty to furnish him a crossing. The plaintiff had a grade farm crossing some little distance to the eastward of this stone arch and another grade crossing a short distance to the westward, and these crossings were maintained by the defendant so far as it appears in good condition for use. The only evidence as to the undercrossing through the trestlework of the bridge which existed before the construction of the stone arch was commenced indicates that plaintiff had without objection on the part of the defendant been accustomed to drive his teams and have his cattle pass through such trestlework at one side of the little stream. Such a permissive use, no matter how long continued, will not in itself ripen into a right to have such opening maintained as a private undercrossing. *Schrimper v. Chicago M. & St. P. R. Co.*, 115 Iowa, 35.

When plaintiff served notice on defendant of his objection to the closing of this undercrossing, he asserted that ever since the railway had been built the trestlework bridge had been so kept and maintained

4. SAME: as to give him an under passway and road  
undercrossing: maintenance.  
which he had constantly used and which was of great value to him but he did not assert that he had a right to such undercrossing as a private crossing such as was contemplated by statute. As no response was ever made to this notice, the assertions of right therein were not acquiesced in at the time by defendant. Whatever acquiescence there was manifested by writing on defendant's part was in response to a request or suggestion that a passway under the track alongside of a culvert for the water would be more satisfactory and passable, and not more expensive to the company than the stone arch which defendant contemplated constructing, and, in re-

sponse to this request, plaintiff was assured that the defendant expected to leave him something that would be all right for cattle to pass, and that the bottom would be so paved with rock so that cattle could get through it. We think this assurance on the part of defendant did not constitute a recognition of a statutory right on the part of plaintiff to have an undercrossing nor an assurance that such an undercrossing would be maintained for him in the future. The right thus conceded to plaintiff was no doubt more than a mere revocable license. It was an assurance which plaintiff had the right to rely upon that his cattle would be allowed to pass through this stone arch, and, perhaps more than this, that a stone paved way would be maintained which would render the passage a suitable one for cattle, although it was also used for the passage of the water of the stream, but it was certainly nothing more than an easement or a right to use such stone arch with the stone paving under it for the passage of cattle, and this right the defendant has not controverted. It has so arranged its right of way fences that defendant's cattle have had the opportunity at all times to pass under the stone arch from one part of plaintiff's farm to the other. But the grantor of an easement consisting of a right of way in the absence of any express stipulation is under no obligation to maintain the right of way in suitable condition for use. He is bound not to obstruct it, but further than that its maintenance is left to the grantee. *Joslin v. Sones*, 80 Iowa, 534; *Bellevue v. Daly*, 14 Idaho, 545 (94 Pac. 1036, 15 L. R. A. (N. S.) 992, 125 Am. St. Rep. 179); *Nichols v. Peck*, 70 Conn. 439 (39 Atl. 803, 40 L. R. A. 81, 66 Am. St. Rep. 122); *Oney v. West Buena Vista L. Co.*, 104 Va. 580 (52 S. E. 343, 2 L. R. A. (N. S.) 832, 113 Am. St. Rep. 1066).

While it is true that a railroad company may by agreement with the landowner become bound to maintain



more than one private crossing in the discharge of its duty to furnish a "causeway or other adequate means of crossing" its tracks, yet the landowner is not entitled as of right to an undercrossing, and, if the company has provided a statutory crossing, the fact that it permits a landowner to use an opening under its track does not, in the absence of anything more, convert such opening into a statutory private crossing which the company is bound to maintain. If the plaintiff should complain at some future time that the surface crossings were not adequate, nor properly maintained, it would be no answer on the part of defendant to say that this stone arch had been agreed upon by the parties as a private way such as is required by the statute. It is not large enough to admit the passage of teams hauling wagons loaded with farm produce, and plaintiff could very properly insist that it was not such a private crossing as the statute contemplates. See *Herrstrom v. Newton & N. W. R. Co.*, 129 Iowa, 507. If it is not such a crossing as the plaintiff has accepted or is bound to accept, then we think the defendant is under no obligation to maintain it for his benefit as a statutory private crossing.

It appears that the obstruction of this stone arch was due to the filling of the little valley to the north with sediment, and that, when plaintiff did finally open

a small ditch through this sediment, he  
 5. SAME. reduced by at least a foot the depth of the sediment in the arch. There seems no reason to doubt that had he kept open the course of the little stream through his own land the bank of sediment would not have formed in the arch. But, if it had been necessary for him to go upon defendant's right of way for the purpose of constructing a ditch through which the water might run so as to remove the dam formed by the sediment, we think he would have had a right to do so in view of the concession to him of the privilege

of using the arch as a cattle pass. It may well be that a landowner has no right to go upon the company's track for the purpose of repairing a statutory private crossing at grade, for to allow him to do so would authorize an interference with the use of the track for the purpose of the operation of trains which might be very perilous to the public as well as to the company. But we can see no reason in public policy for denying to plaintiff in this case the right to go through a stone arch which has a stone pavement and dig a ditch in the sediment deposited therein or otherwise remove the sediment, so that his cattle may pass through. Certainly a railway company may grant a license or easement on its right of way so far as no interference with the operation of its road is involved.

If the defendant by its negligence in failing to maintain a proper opening through its embankment for Soap Creek caused a flood depositing sediment in the valley of this little stream and in the stone arch to the damage of plaintiff by obstructing the passage for his cattle as well as by causing the destruction of his crops, then no doubt the expense of again opening the archway would be a proper element of damage in an action for such negligence. But plaintiff sued for damages on account of the failure of defendant to keep the archway open as an independent cause of action, and was allowed to recover by way of damages the depreciation in the rental value of plaintiff's farm for four years. In allowing recovery on this basis we think that the trial court erred.

As the jury has indicated by a special finding that the damage allowed on account of the obstruction of the archway as affecting the rental value of plaintiff's farm was \$300, plaintiff may remit that amount of the verdict, and the judgment for the plaintiff for the balance of the general verdict will be allowed to stand. In the absence

6. FLOOD WATERS:  
obstruction:  
damages.

of such election within thirty days after the filing of this opinion, the judgment will be deemed reversed, and the defendant shall be entitled to a new trial.—*Affirmed* on condition.

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ELIZABETH WOOD and S. J. POOLEY, Guardian of CLIFTON D. WOOD, and HAZEL D. WOOD, v. BROTHERHOOD OF AMERICAN YEOMEN, Appellant.

**Beneficial insurance:** ACTION UPON CERTIFICATE: REMEDY. A certificate of insurance which provides for indemnity in an amount to be realized from a single assessment not exceeding a specified sum is enforceable only in equity, but one stipulating for the payment of a stated sum without reference to an assessment is enforceable at law.

**Same:** SUBSTITUTED CERTIFICATE: DATE: FORFEITURE. Where a new beneficial certificate of insurance, issued as a substitute for the original certificate and bearing the date of the original certificate, stipulated that suicide of the insured within three years from the date of the certificate would invalidate the same, the date referred to has reference to the time specified in the original certificate; and the suicide of the member after the lapse of three years from the date of the original certificate did not invalidate the substituted certificate.

**Same:** CHANGE IN BENEFICIARY. Where a member of a beneficial insurance society having the absolute right under the bylaws to change the beneficiary does all that is necessary to effect a change, an equitable assignment for the benefit of a new beneficiary is effected, even though the member dies before the issuance of the certificate making the change; and the new beneficiary can enforce the certificate.

**Same:** ISSUANCE OF NEW CERTIFICATE. Where a member of a beneficial insurance society surrenders his certificate for the sole purpose of making a change in the beneficiary, the society can not change the conditions of the contract without the assent of the member; and where the certificate is surrendered solely for that purpose with a request that the insurance be continued in favor of the new beneficiary under a new certificate, in other respects identical with that surrendered, a delivery of the new certificate is not essential to the validity of the contract. But if the new certificate, instead of being responsive to the application for the

change, contains new or different conditions from those of the original certificate, it will not be effective until the assured has indicated his acceptance of the new conditions.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN,  
Judge.

TUESDAY, JUNE 14, 1910.

ON motion, judgment was entered for plaintiffs on the pleadings. The defendant appeals. *Reversed.*

*E. C. Corry and Dunshee & Haines*, for appellant.

*Ryan & Ryan*, for appellees.

LADD, J.—After the issues had been made up, judgment, on motion of plaintiffs, was entered in their favor for the amount of the certificate of insurance less deductions for the reserve fund. Necessarily, this ruling was based on facts conceded by the pleadings, and these may be stated. The defendant is a fraternal society organized under chapter 9 of title 9 of the Code, and as such delivered to Geo. D. Wood a certificate of insurance, May 31, 1899, with his then wife, Ella F. Wood, named therein as beneficiary. The certificate in terms made the application part thereof, and agreed "that in event of my death by suicide, whether sane or insane, any certificate issued upon said application by said order shall be void." A by-law allowed any member to change beneficiaries if the assured pay to the correspondent a fee of fifty cents and deliver to him the benefit certificate with written surrender on the back thereof and directions as to the change desired and name and relationship of the beneficiary. "The correspondent shall then forward the certificate with the fee of fifty cents to the chief correspondent, who shall at once issue a benefit certificate as requested." Ella

F. Wood died, and, in accordance with this by-law, the insured on November 21, 1903, surrendered the certificate to the local correspondent and made a written request for the change in words following: "I, George D. Wood, the same person to whom this certificate was issued, hereby authorize the officers of the castle to cancel this certificate and issue a new one for \$3,000.00—(payable to Elizabeth Wood, Clifton D. and Hazel D. Wood, wife and children, share and share alike the survivor or survivors.) I declare that I have complied with all the laws of this fraternity, and all its regulations, in the presence of these witnesses whose names appear below." This was accompanied with the fee required, and with the certificate was forwarded to the chief correspondent, who on December 3d issued a new certificate with the names of the above persons inserted as beneficiaries, among other things stipulating that "if said member shall die by his own hand, whether sane or insane, within three years from the date of this certificate, . . . then this certificate shall be null and void." The monthly assessment was fixed therein at \$1.85, instead of \$1.70, as in the original certificate. In the original certificate, upon the death of the assured, payment of "the amount realized from one assessment not to exceed \$3,000" was stipulated, while in the new certificate a lump sum of \$3,000 was to be paid subject to this provision, which was not in the original: "That should said member die before having lived out his expectancy of life, based on his age at entry according to the American Experience Tables of Mortality, there shall be paid into the reserve fund of this association out of the proceeds of this certificate otherwise payable to the beneficiary a sum equal to the amount of ten assessments per year at the rate last paid by the member for the unexpired period of such life expectancy, based on his age at entry, and any accident or disability benefits to which he may become entitled shall be sub-

jected to proportionate deduction for the reserve fund, to be used for the payment of assessments in any year in excess of the amount required for the payment of six deaths to the thousand members in good standing." The date at the end of the last certificate was the same as that on the first, May 25, 1899. The new certificate was mailed to the local correspondent, who received it December 3, 1903; but whether it was ever delivered to the assured, who died the next day, was put in issue by the pleadings. In ruling on the motion the court must have proceeded on the theory that it was not delivered, and also that the allegation of the answer that the assured's death was suicidal was true.

I. It is apparent that no recovery can be had on the original certificate alone, for by its terms no indemnity is payable upon death resulting from suicide. Moreover,

1. BENEFICIAL  
INSURANCE:  
action upon  
certificate:  
remedy.

the action is at law, and it provides for the payment of an assessment only which could be enforced in equity alone. *Sleight v. Supreme Council*, 121 Iowa, 724. The new

certificate stipulates for the payment of a lump sum without reference to an assessment, and, under numerous authorities, the remedy on it is at law. *Van Norman v. Modern Brotherhood of America*, 134 Iowa, 574. As seen, this differs materially from the first certificate, and with respect thereto appellant contends: (1) That it never became effective save in changing beneficiaries because never delivered to the assured; (2) nor accepted by him in the manner prescribed therefor; (3) nor was defendant notified of such acceptance; and (4) even if all this had happened, three years had not elapsed after its date, and therefore the suicide clause obviated all liability.

II. The last ground may be disposed of first and the previous three together. The clause in the last certificate relating to suicide invalidates it if suicide is committed "within three years from the date of this certi-

ficatē.” This should be construed to have reference to the time specified in the instrument. As applicable to papers, Webster gives two definitions of “dates”: “(1) That statement or formula affixed to a writing, inscription, coin, etc., which specifies the time (as day, month, and year) and often the place of execution or making. (2) The point of time at which a transaction or event takes place or is appointed to take place.” The date is often an important part of the instrument, and, when coupled with another provision relating to when something is to be done, should not be disregarded. Especially is this true where the instrument is executed as a substitute for another and the date of the original designedly inserted. As said in *Bement v. Trenton, etc., Mfg. Co.*, 32 N. J. Law, 513: “The primary signification of the word ‘date’ is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time given or specified, time in some way ascertained or fixed; this is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date of an item or of a charge in a book account is not necessarily the time when the article charged was in fact furnished, but simply the time given or set down in the account, in connection with such charge.” Moreover, if the instrument is open to different constructions, that most favorable to the insured should be adopted. Death having occurred more than three years subsequent to the date of the certificate, that it was suicidal did not constitute a defense to the second certificate.

III. The petition alleged the delivery of a new certificate to the assured. This was denied by the defendant, but it admitted that it had been mailed to the local correspondent. Were the question merely whether these

2. SAME:  
substituted  
certificate:  
date:  
forfeiture.

plaintiffs might recover as beneficiaries, it could be easily solved. The assured had done all that was

3. SAME:  
change in  
beneficiary.

required of him to effect a change of beneficiaries. He had the absolute right under

the by-laws to make the change proposed, and, even though he had died before the new certificate issued, an equitable assignment of the benefits would have been effected, and these plaintiffs might have enforced their right to the indemnity unless for some other reason the certificate had become invalid. *Hirschl v. Clark*, 81 Iowa, 200; *Shuman v. A. O. U. W.*, 110 Iowa, 642; *Lorscher v. Supreme Lodge Knights of Honor*, 72 Mich. 316 (40 N. W. 545, 2 L. R. A. 206); *Pledger v. Sovereign Camp Woodmen of the World*, 17 Tex. Civ. App. 18 (42 S. W. 653); *Berkeley v. Harper*, 3 App. Cas. (D. C.) 308; *Bowman v. Moore*, 87 Cal. 306 (25 Pac. 409); *National Am. Ass'n v. Kirgin*, 28 Mo. App. 80; *Luhrs v. Luhrs*, 123 N. Y. 367 (25 N. E. 388, 9 L. R. A. 534, 20 Am. St. Rep. 754); *Waldum v. Homstad*, 119 Wis. 312 (96 N. W. 806). The rule requiring the surrender of the certificate, and for that matter most of the rules with respect to changing beneficiaries, is intended for the benefit of the insurer. *Simcoke v. A. O. U. W.*, 84 Iowa, 383.

Upon the surrender of a certificate of insurance for the purpose of changing beneficiaries, the insurer is not at liberty to alter, add to, or take from other conditions

of the contract in the new certificate and thereby bind the insured without his assent.

4. SAME: iss-  
uance of new  
certificate.

By surrendering the policy or certificate, with the request that the insurance be continued in favor of other and different beneficiaries, the insured impliedly applies for a new policy or certificate, substantially identical with that surrendered, except that the indemnity stipulated be payable to persons other than those designated in the first policy or certificate. *Mallette v. Assurance Co.*, 91 Md. 471 (46 Atl. 1005); *Insurance Co. v. Walsh*, 54



Ill. 164 (5 Am. Rep. 115). In such a contract delivery is not essential, for the proposal has been accepted and the agreement is complete. See *McCully v. Phoenix Mutual Life Ins. Co.*, 18 W. Va. 782; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, (30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134). But if the policy or certificate, instead of being responsive to the application, contains conditions in addition to or differing from those of the certificate originally surrendered, it amounts to no less than a new or counter proposition and will not take effect until the assured has indicated in some way his acceptance of the new terms. See *Stephens v. Insurance Co.*, 87 Iowa, 283; *Key v. National Life Ins. Co.*, 107 Iowa, 446; *Armstrong v. Mutual Life Ins. Co.*, 121 Iowa, 362.

Assuming, as we must, that the certificate had never reached the insured, there could have been no acquiescence on his part in the change from the certificate surrendered whereby the monthly assessments were increased and the indemnity decreased by the reservation clause. As to these, there had been no agreement. Mutual assent, the meeting of the minds, as essential to a contract of insurance as any other, was utterly wanting. *Mutual Life Ins. Co. v. Young*, 90 U. S. 85 (23 L. Ed. 152); *Yore v. Bankers', etc., Ass'n*, 88 Cal. 612 (26 Pac. 514); *Robinson v. U. S. Ben. Soc.*, 132 Mich. 695 (94 N. W. 211, 102 Am. St. Rep. 436). This conclusion is not obviated by the circumstance that certificates such as the last were issued to persons becoming members after January 1, 1902, for deceased was already a member; nor is there any basis for a plea in estoppel because of defendant pleading the new conditions, for it does not rely on these as a defense, as suggested, but on the fact that the assured had never assented thereto, and for this reason the certificate did not become effective as a contract. Plainly enough, under these well-settled principles, the substituted beneficiaries might

not maintain an action on the second certificate, the facts being as conceded by the pleadings, and the defense of suicide was fatal to recovery on the first certificate.—*Reversed.*

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HOULETTE & MILLER, Appellees, v. LEW ARNTZ and MRS. LEW ARNTZ, Appellants.

**Building contract:** WAIVER OF DEFECTS. Where the owner of a building examines and inspects the same while in progress of construction, and with full knowledge of the material used and character of the work done makes payments to the contractor and gives him a note in settlement of the balance due, he can not thereafter counterclaim in a suit upon the note for damages because of inferior work and material.

**Same:** DAMAGES: EVIDENCE. The giving of a note, as in this case, for a balance due a contractor under his building contract is *prima facie* evidence of a settlement of all matters pertaining to the contract; and to sustain a counterclaim for damages in a suit upon the note because of defects in the work, the owner must not only establish the defects but he must also show that the settlement was made without notice or knowledge of the defects, and without reasonable opportunity to discover the same.

**Same:** EVIDENCE: CONSTRUCTION UPON APPEAL. Where, as in this action, the defendant's testimony was conflicting as to whether the note sued upon was given after the work was fully performed, the appellate court will give such evidence the most favorable construction of which it is capable to support a verdict for plaintiff.

**Fraud:** INSTRUCTION. Although there may be a suggestion of fraud in the pleadings, still where there was no evidence which would support a finding of fraud, failure to instruct on the subject was not erroneous.

*Appeal from Polk District Court.*—HON. JAMES A. HOWE, Judge.

WEDNESDAY, JUNE 15, 1910.

ACTION at law upon a promissory note. Defendants plead failure of consideration and counterclaim. Verdict and judgment for plaintiffs, and defendants appeal. *Affirmed.*

*Mulvaney & Mulvaney*, for appellants.

*E. P. Hudson*, for appellees.

WEAVER, J.—Plaintiffs are carpenters and builders, and in October, 1907, undertook to make certain repairs upon the residence property of the defendants for the agreed consideration of \$360, payable one-half in money on the completion of the repairs and the remainder in a promissory note due sixty days after date. It was further agreed that for any work in excess of the specified repairs compensation therefor should be agreed upon in advance. During the progress of the work, or at its completion, defendants paid plaintiffs a sum of money somewhat in excess of the one-half of the contract price, and on December 16, 1907, made and delivered to plaintiffs the promissory note now in suit for \$172.55, due sixty days after said date. They resist payment thereof on the alleged ground that in many particulars the repairs were made with unsuitable and defective materials, and in an unskillful and unworkmanlike manner, by reason of which said repairs were of no use or value. They also plead the same matters in a counterclaim, and demand a recovery in damages to the extent of \$423.50. The plaintiffs in reply deny said counterclaim, and allege that the note was given in settlement for their work done under said contract, and after the same had been fully completed, and with full knowledge on the part of the defendants of the quality of said work, and that defendants are thereby estopped from maintaining their alleged defense and counterclaim. The cause was tried and submitted

to the jury, which found against the defendants, and awarded plaintiffs a recovery for the full amount of the note.

I. Appellants lay down the proposition that the owner of the building upon which the repairs have been made does not as a matter of law accept the work or waive his right to claim damages for defects therein

1. BUILDING CONTRACT: waiver of defects.

simply because he takes possession of or uses or occupies such building or makes payments upon the contract price, and they assert that the trial court erroneously charged the jury that such facts, if found, would preclude defendants from a recovery of damages. The correctness of the rule so stated, may be conceded, but an examination of the record reveals no holding or instruction to the contrary by the court below. What the court did tell the jury in respect to this feature of the controversy was in the following words: "In this connection you are instructed that if the defendants from time to time during the progress of the work in question examined and inspected the same, and, with full knowledge as to the quality of the materials used and of the character of the work done, paid to the plaintiffs thereon certain moneys and made, executed, and delivered to the plaintiffs in settlement of the balance of plaintiffs' claim the note (Exhibit 1), then in that event the defendants can not recover on the counterclaim pleaded by them in this case." It is not only a reasonable rule, but one to which we think there is no exception recognized by the authorities, that if the owner with full knowledge of the quality of the materials used and of the character of the work done settles with the contractor, agrees upon the balance due, and pays the same or gives his note therefor, he can not thereafter be allowed to enforce a claim for damages on account of matters of which he was fully apprised when he entered into the settlement. The instruction was in harmony with this

proposition, and no error was committed in giving it to the jury.

II. Appellants make the further point that there was no evidence whatever on which to base the instruction quoted above. In this counsel misapprehended the record.

Several of the persons engaged in making the repairs testify to the frequent visits of both defendants to the building while the work was in progress, their opportunity to see and know the manner in which it was being done, and their expression of satisfaction with it. While there is some conflict in the testimony on this point, it is quite satisfactorily shown that the note in suit was not given until after the work was fully completed. Dr. Arntz himself says it was given about a month after the work was done, a period which must have furnished at least some opportunity for ascertaining the real character and workmanship of the repairs. The giving of the note is in itself *prima facie* evidence of a settlement of all matters pertaining to the performance of the contract, and the burden was upon defendants, not only to show the alleged defective character of the work, but also to show that the settlement was made without notice or knowledge of the defects and without reasonable opportunity to ascertain them. 1 Am. & Eng. Ency. Law (2d Ed.) 459. The records show a case amply justifying a submission of the question to the finding of the jury. Nor do we find any omission in the statement of the issues which could have worked prejudice to the defendants. The charge correctly states the rule as to the burden of proof, and the essential facts to be found in order to entitle defendants to recover in their counterclaim.

In view of the defendant's concession upon the witness stand that the note was not made until after the work was done, failure to specifically mention that plea was not erroneous, and even if erroneous, we think in view of the entire record it was error without prejudice. It is true

2. SAME:  
damages:  
evidence.

that Dr. Arntz in other parts of his testimony says the note was given before the work was completed, but we must give to his evidence the most favorable construction of which it is capable to support the verdict returned.

3. SAME:  
evidence:  
construction  
upon appeal.

There is in the answer a suggestion of a plea of fraud and deception practiced by plaintiffs in obtaining the note in suit, but there is no evidence upon which such a finding by the jury could be upheld, and there was no error in the failure to instruct thereon.

4. FRAUD:  
instruction.

The case seems to have been fairly tried, the verdict has sufficient support in the record, and no good ground is shown for ordering another trial.

The judgment of the district court is *affirmed*.

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JAMES KING, Appellant, v. THE CITY OF OTTUMWA,  
IOWA, ET AL.

**Municipal corporations:** APPOINTMENT OF OFFICERS: SOLDIERS PREFERENCE LAW. The statute requiring the council in cities of the first class to appoint a street commissioner at the first meeting after the biennial election fixes the term of such officer for two years, with express power of appointment at the expiration of that time; and a veteran appointed to the office can not invoke the soldiers preference law as against another qualified veteran appointed at the close of the two year term.

*Appeal from Wapello District Court.*—HON. FRANK EICHELBERGER, Judge.

WEDNESDAY, JUNE 15, 1910.

PLAINTIFF was applicant for the position of street commissioner in the city of Ottumwa in April, 1905, but Andy Hill received the appointment. Thereupon plaintiff instituted suit in mandamus praying that the office

be declared vacant and the city council be compelled to appoint him thereto. Issues were joined, but on October 16, 1905, a compromise was effected, in pursuance of which plaintiff was appointed to the position under the soldiers' preference law. See section 1056a15, Code Supp. 1907 (30th General Assembly, chapter 9). On April 2, 1907, the political complexion of the council having changed, Henry Arnold, also an honorably discharged soldier of the Civil War with requisite qualifications was appointed street commissioner. Subsequently Arnold was removed by the mayor of the city, and Henry Adcock, also a qualified veteran of the Civil War, was by him appointed in his stead. In this action, plaintiff prayed for restoration to the position and for damages. On hearing the petition was dismissed, and plaintiff appeals. *Affirmed.*

*Chester Whitmore*, for appellant.

*Clyde Sparks*, for appellees.

LADD, J.—Section 651 of the Code provides that, "in cities of the first class, the council at its first meeting after the biennial election, shall appoint . . . a street commissioner." This, in effect, fixed the term of such officer for two years, for at the end of that time the power of appointment is expressly conferred. Upon the resignation of one Hill as street commissioner of the city of Ottumwa, the plaintiff was appointed in his stead October 16, 1905, and continued in the discharge of his duties until the first meeting of the council after the biennial election in April, 1907, when one Henry Arnold was appointed to the position. Subsequently Arnold appears to have been removed by the mayor of the city and Henry Adcock to have succeeded him. Each of these appointees is conceded to have possessed the requisite qualifications under the soldiers' preference law, the sole issue

being whether plaintiff, in the absence of removal in pursuance of the procedure prescribed in section 2 of the acts of the Thirtieth General Assembly (section 1056a16, Code Supp. 1907), was entitled to continue in the position of street commissioner indefinitely. The soldiers' preference law does not purport to affect existing laws with respect to terms of office or service. This was recognized in *Kitterman v. Board of Supervisors*, 145 Iowa, 22. And, where the term is prescribed by statute, the appointment is for the period therein defined, and not indefinitely as in the *Kitterman* case. The incumbency is terminated by the statute fixing the period of service, and there is no occasion for invoking the section of the preference law relating to removals. The term for which plaintiff was designated expired in April, 1907, and, in appointment of his successor, heed must have been given to the preference law; but plaintiff, because of having served before, was not entitled to preference over others in like situation. Both Arnold, appointed by the council, and Adcock, appointed by the mayor, after the authority to do so had been conferred on him (section 651, 652, Code Supp. 1907), are conceded to have been qualified as veterans of the Civil War, and there was no error in dismissing the petition.

*Affirmed.*

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SARAH I. SLATER, Appellee, v. EDMUND H. ROCHE,  
Appellant.

**Limitation of actions: COMMENCEMENT OF ACTION: ATTACHMENT:**

- 1 An action to subject property of a nonresident to the payment of a foreign judgment is commenced, within the meaning of the statute of limitations, when the property is levied upon under a writ of attachment, and the statute then ceases to run.

**Judicial notice.** The court will take judicial notice of all papers  
2 regularly issued, filed and returned in the case; as a writ of at-



tachment or the return of the officer thereon, without its formal introduction in evidence.

**Limitations of actions: ATTACHMENT: ENFORCEMENT OF LIEN.** An  
3 action upon a foreign judgment against a nonresident aided by attachment, is, so far as the attachment is concerned, a proceeding *in rem* or *quasi in rem*; and the property of defendant levied upon under the attachment before the running of the statute of limitations may be subjected to the payment of the debt, even though a personal judgment can not be rendered against the defendant because the action for that purpose was not commenced in time.

**Same: COMMENCEMENT OF ACTION: PERSONAL JUDGMENT.** An action  
4 against a nonresident is not commenced within the meaning of the statute of limitations by the filing of the petition or the affidavit for publication of notice, but upon completed publication of the notice; and where the publication is not complete until after the running of the statute a personal judgment can not be rendered even though the defendant personally appears after the claim is barred.

*Appeal from Polk District Court.*—HON. JAMES A. HOWE,  
Judge.

THURSDAY, JUNE 16, 1910.

ACTION aided by attachment upon a foreign judgment. Defendant pleaded the statute of limitations. Upon trial to the court judgment was rendered subjecting the attached property to the payment of the judgment, but denying a personal judgment against defendant for the remainder. Both parties appeal; but, as defendant first perfected his appeal, he will be called appellant.—*Affirmed.*

*Mulvaney & Mulvaney*, for appellant.

*Dunshee & Haines* and *C. R. Dorn*, for appellee.

DEEMER, C. J.—A judgment in favor of plaintiff and against the defendant was rendered by a district court

of the state of Minnesota on the 8th day of December, 1897, for the sum of \$416.28. On the 23d day of November, 1907, plaintiff filed a petition in the district court of Polk county, Iowa, in which she asked judgment for the amount of the Minnesota judgment with interest and costs. Alleging that defendant was a nonresident of the state, she asked and obtained a writ of attachment against the property of the defendant, which writ was issued, and upon the same day levied upon certain property of the defendant in Polk county, Iowa. Notice of the levy was immediately served upon the manager of a company in which defendant was interested. On November 26, 1907, a proper affidavit for publication of notice was filed, and on the 24th day of December proof of publication of notice was filed in the Polk county district court. The affidavit of publication showed that the notice was published November 27, December 4, December 11, and December 18, 1907. April 11, 1908, plaintiff filed an amendment to her petition and also a supplemental petition, and on May 4, 1908, she filed another amended and supplemental petition. Defendant appeared and filed answer October 31, 1908, in which, among other things, he pleaded the statute of limitations. He also pleaded a Minnesota statute reading as follows: "No action shall be maintained upon a judgment or decree of a court of the United States, or of any state or territory thereof, unless begun within ten years after the entry of such judgment." Section 4075, chapter 77, Rev. St. 1905.

A demurrer to defendant's answer and plea of abatement was overruled, and thereupon plaintiff filed a reply, in which, among other things, she pleaded a statute of Minnesota reading as follows: "If, when a cause of action accrues against a person, he is out of the state, an action may be commenced within the time herein limited after his return to the state; and if, after the cause of action accrues, he departs from and resides out

of the state, the time of his absence is not part of the time limited for the commencement of the action." Section 4082, Rev. Laws. She further averred that, after the rendition of said judgment, the defendant departed from the state of Minnesota, and was absent from said state several years, by reason of which plaintiff's cause of action on said judgment was never fully barred by the laws of the state of Minnesota. Upon these issues the case was tried to the court, a jury being waived, resulting in a judgment condemning the attached property and ordering it subjected to the payment of plaintiff's judgment for the sum of \$704.93, but denying plaintiff's prayer for personal judgment.

Appellant contends that under the Minnesota statute first quoted plaintiff's action was fully barred, and that the trial court erred in subjecting the attached property to the payment of the Minnesota judgment.

1. LIMITATION  
OF ACTIONS:  
commencement  
of action:  
attachment.

Plaintiff contends that the court erred in not rendering personal judgment against the defendant for the full amount of the Minnesota judgment with interest and costs. It is conceded that at all times material to our inquiry defendant was a nonresident of this state, and it is also conceded that, if this action was not commenced within ten years from the time of the rendition of the Minnesota judgment, this action is barred. Completed service of notice by publication was not had until December 18, 1907, which was more than ten years after the rendition of the Minnesota judgment, although the first two publications were made within that time. However, the writ of attachment was issued, levied, and returned within the ten years, although defendant did not personally appear until some months after the expiration of the ten-year period. It is contended that action was not commenced until the completion of the service of notice by publication. This seems to be the rule established by this court. *Littlejohn*

*v. Bulles*, 136 Iowa, 150; *Bardsley v. Hines*, 33 Iowa, 157. Neither the filing of the petition nor of the affidavit for publication in themselves amounted to the commencement of the action, and, as completed service was not had until the expiration of the ten-year period, plaintiff's action is barred, unless it be for the fact that an attachment was sued out and levied upon defendant's property in this state before the expiration of the ten-year period. We have held that, where an action is aided by attachment, it is to be deemed commenced when the petition is filed. *Hagan v. Busch*, 8 Iowa, 309. Again, in *Sweatt v. Faville*, 23 Iowa, 321, which was an action for an injunction, it was held that the action was commenced "at least when the writ was served," and was not barred although no notice was delivered to the sheriff or served within the statutory period. In *Lacey v. Newcomb*, 95 Iowa, 287, we held that the filing of a claim with an assignee for the benefit of creditors was the commencement of an action and stopped the running of the statute of limitations. So, also, it has been held that the filing of a note with an administrator of an estate is the commencement of a suit. *Fritz v. Fritz*, 93 Iowa, 27. These cases by analogy point the way to the decision of this appeal. This action was to subject the property of a nonresident to the payment of a foreign judgment. It could only be done by attaching the property—the *res*—and when that was done the action was commenced within the meaning of the limitation statutes. Moreover, defendant's agent and manager was served with notice of the levy. We are constrained to hold that the action, in so far as it was brought to subject property to the payment of the judgment, was commenced when the property was levied upon, if not before, and that it is not barred by the statute.

II. But appellant contends that plaintiff did not offer the writ of attachment or the return of the officer

thereon in evidence, and that for this reason the trial court was in error in rendering any kind of judgment in the case. The writ was issued in the case on trial, and plaintiff was relying upon the issuance and service thereof in support of her claim. The trial court found that a writ was issued and in its judgment copied the return made by the sheriff. It does not appear that defendant made the point upon which it now relies in the trial court; but if it did no ground for reversal on this score appears. The court was justified in taking judicial notice of all the papers properly issued and filed or returned in the case. That it did take such notice is apparent from the record. This question of the right and duty of the court to take judicial notice of the papers and proceedings in the case on trial is fully considered in the recent case of *Haaren v. Mould*, 144 Iowa, 296. See, also, *Poole v. Seney*, 70 Iowa, 275; *State v. Olds*, 106 Iowa, 114; *Kenosha Co. v. Shedd*, 82 Iowa, 544; *Conlee Co. v. Meyer*, 74 Iowa, 403.

The trial court found that the levy of the writ of attachment was sufficient to stop the running of the statute in so far as the attachment was concerned, but insufficient in so far as personal judgment was sought against the defendant who was a nonresident. Defendant did not personally appear until after the statute of Minnesota had fully barred the claim, and he pleaded that statute as a bar to the cause of action. It was only by reason of his personal appearance that judgment might be rendered against him. At that time, however, the action against him personally was barred; hence plaintiff had no right to a personal judgment. But it does not follow that plaintiff was not entitled to subject the property attached to the payment of the judgment. The action, in so far as the attachment is concerned, was *in rem* or *quasi in rem*. In other words, it was an action to subject the

2. JUDICIAL  
NOTICE.

3. LIMITATION  
OF ACTIONS:  
attachment:  
enforcement  
of lien.

property of a nonresident to the payment of a foreign judgment against him. This action, as we have seen, was commenced in time and could proceed to judgment even though defendant did not appear. So that whether he appeared or not plaintiff was entitled to subject the property. Defendant's appearance gave him no greater rights in this respect than if he had not appeared. Upon appearance plaintiff would be entitled to personal judgment against him unless the right thereto was barred; but his appearance did not deprive plaintiff of the right to proceed with the attachment. As that action was not barred, the property could be subjected to the payment of the debt, although by reason of the statute of limitations no personal judgment could be obtained against the defendant. Defendant's counsel reason in a circle when they say that the attachment can not be sustained for the reason that there is no debt which can be enforced against the defendant. When the action was commenced, there was a debt which could be made the basis of an attachment suit, and nothing which defendant might do or fail to do would affect plaintiff's right to subject the property. Upon the levy of the writ that right became fixed, and the statute, in so far as the right to subject the property to the payment of the debt is concerned, was suspended and ceased to run. It is not necessary that the debt be enforceable as a personal claim in order to justify the subjection of property to the payment thereof. If the action had been against a resident of this state, perhaps a different rule might apply. Upon that question we make no pronouncement at this time.

III. Plaintiff's appeal is based upon the holding of the trial court that she was not entitled to personal judgment against the defendant for the full amount of the Minnesota judgment with interest and costs. Unless the action was commenced in time so that the statute of limitations did not bar the claim, the holding of the trial

court was correct. Defendant's personal appearance was the only justification for a personal judgment against him, and, as this was after the judgment was barred, no personal judgment could properly be rendered. Neither the filing of the affidavit for publication nor the two publications of notice amounted to the commencement of the action for any purpose. If publication of notice be sufficient to arrest the running of the statute upon a personal claim—a point which we do not decide—such publication must be complete before the action may properly be said to have been commenced. Ordinarily an action is "commenced" by the service of notice; and the service contemplated is a completed one. For the purpose of the statute of limitations, other things may be regarded as the commencement of the suit, as the delivery of the notice to the sheriff with intent that it be served immediately as provided in section 3450 of the Code. But there is no provision for treating any step short of completed service as the commencement of an action where the service is by publication. The trial court was right in denying plaintiff a personal judgment against the defendant.

No error appears, and the judgment must be, and it is, *affirmed*.

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THOMAS M. ASHCRAFT, Appellee, v. DAVENPORT LOCOMOTIVE WORKS, Appellant.

**Master and servant: INJURY TO SERVANT: DEFECTIVE MACHINERY: EVIDENCE.** In this action for injury to plaintiff while assisting in unloading steel plates from a car by the use of a clamp machine by which the sheets were raised and lowered from the car, the evidence is held insufficient to show that the clamp was defective, causing it to lose its hold upon one of the plates which fell and injured plaintiff.

**Same: BURDEN OF PROOF: *Res ipsa loquitur*.** A servant claiming that  
 2 his injury was the result of defective machinery furnished by  
 the master not only has the burden of showing the claimed defect therein for which the master was responsible, but must also show that this defect was the proximate cause of his injury; so that where there are several causes which may have operated to produce the injury, for one of which, only, the master was responsible, the doctrine of *res ipsa loquitur* does not apply, and if nothing more than the happening of the accident is shown in such a case the servant has failed to establish his cause of action.

**Same: NEGLIGENCE OF CO-EMPLOYEES: INSTRUCTIONS.** Where, as in  
 3 this case, the uncontradicted evidence showed that defendant furnished clamps of different sizes for lifting plates of different sizes, and that when plates were thin so that the clamp was liable not to hold the same wedges were provided to be placed between the plates and the clamp jaws, instructions that if defendant did not use ordinary care in supplying and using the clamp in question it was liable, were erroneous, because making the defendant responsible for the manner in which the clamp was used by co-employees.

**Same: NEGLIGENCE: DUTY TO WARN: EVIDENCE.** Where there was  
 4 evidence that plates of steel had slipped from the clamp and fallen while being so handled, of which defendant had knowledge and concerning which the plaintiff, an inexperienced workman, was not advised, it was the duty of the defendant to warn plaintiff of the possible danger; and under the evidence in this case the negligence of defendant in this respect was for the jury.

**Same: FELLOW SERVANT: VICE-PRINCIPAL.** Defendant's foreman, who  
 5 was superintending the unloading of the plates in question by plaintiff and others, was plaintiff's fellow servant in the matter of performing the work and selecting the tools used, but he was a vice-principal for the purpose of warning plaintiff of dangers incident to the work.

**Negligence: INSTRUCTIONS.** It is the duty of the court in submitting  
 6 questions of negligence to confine the jury to a consideration of the grounds of negligence charged, rather than permit them to find for plaintiff if any negligence on the part of defendant was shown.

**Same: KNOWLEDGE OF DANGER: DUTY TO WARN: EVIDENCE.** Although  
 7 the clamp used in the instant case for unloading the sheets of steel was a proper device to use for that purpose, still, if sheets of steel were liable to fall endangering the workman, of which plaintiff was not aware, it was the duty of defendant to warn him of such danger; and evidence that plates had previously fallen



while being handled with clamps of the type used at the time in question was admissible, on the questions of defendant's knowledge of the danger and its duty to warn plaintiff.

*Appeal from Scott District Court.*—HON. JAMES W. BOLLINGER, Judge.

THURSDAY, JUNE 16, 1910.

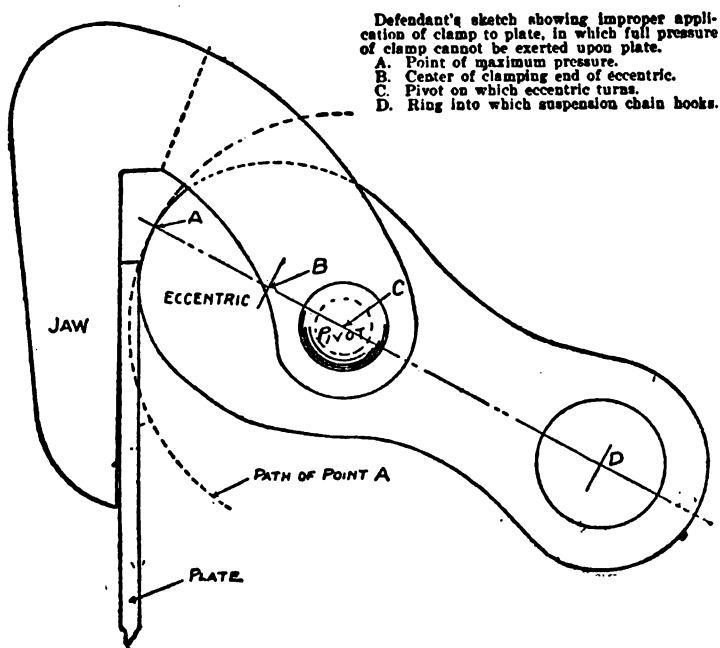
ACTION at law to recover damages for injuries received by plaintiff due to a fall upon him of a heavy piece of boiler plate which was being handled by defendant's employees with the use of a crane. Defendant denied liability, pleaded that the negligence, if any, was that of a fellow servant, and also assumption of risk. The case was tried to a jury, resulting in a verdict for plaintiff in the sum of \$15,000. The trial court overruled defendant's motion for a new trial on condition that plaintiff accept judgment for \$7,500, which he did, and judgment was rendered for the latter amount. Defendant appeals. *Reversed and remanded.*

*Ely & Bush and Cook & Balluff*, for appellant.

*Lane & Waterman and M. V. Gannon*, for appellee.

DEEMER, C. J.—Plaintiff was employed by defendant as a boiler maker's helper, and on the day of the accident was directed by the foreman to assist in unloading from a railway car some steel plates or sheets. Plaintiff had never been engaged in this work before, and testified that he did not know the perils thereof. The sheets or plates were about ninety-six inches wide, one hundred and twenty inches long, and varied in thickness from one-fourth to one-half inch, some of the testimony tending to show that there were a few three-sixteenths of an inch in thickness. They each weighed approximately one thousand

pounds. The object was to unload them and pile them up on the ground some distance from the car. One Wiggers was known as defendant's outside foreman, and he had charge of the unloading in which plaintiff was engaged. Wiggers directed plaintiff, who was on the ground, to keep the sheets of steel away from the railway car, and was engaged in the performance of this duty, being between the steel plate and the car when the plate fell over and upon him, causing the injuries of which he complains. The heavy part of the work was done with a movable crane, chains, and clamp or clamps. These clamps were of the so-called "never slip" variety, and it is not contended that such a clamp, if in proper repair, was not a proper tool or appliance for doing the work. As this clamp is difficult of description, we here set forth a drawing thereof in order that the case may be better understood.



As will be observed, this clamp has a jaw and an eccentric working on a pivot. This eccentric is so constructed that, when a steel plate is inserted far enough into the jaw and a chain attached to the farther end of the eccentric and raised, the sheet of steel is clamped between the eccentric and the jaw and firmly grasped; the grip becoming more secure as the chain attached at point "D" is drawn. The defendant had in its shop different sized clamps for handling the different sizes of plates, and, when any particular sheet did not seem to be tightly enough clamped, the men were accustomed to put in blank sheets as a sort of wedge. On the day in question Wiggers was on the car, and it was his duty to select proper clamps, to see that they were properly adjusted and attached to the plates, and, if necessary, to see that wedging was done. After this, he gave a signal, and the plate was swung up and clear of the car, and carried over to the pile which was being made upon the ground.

Plaintiff was directed to keep the plate as it was being unloaded away from the car and to keep it from going underneath. A clamp had been adjusted to one of the sheets. It had been raised clear of the car and taken to one side thereof, and was being lowered to the pile, when plaintiff went between it and the car, and was pushing it away therefrom when the plate slipped from the clamp, fell to the ground, and over and upon plaintiff, producing severe and permanent injuries. While many grounds of negligence were charged, there were but two submitted by the trial court, and these were (1) that the clamp which was being used was defective and out of repair and insufficient to hold the plate in its grasp; and (2) defendant's failure to warn plaintiff of the danger of the plates slipping from the clamp and falling. One of these proceeds upon the theory that the clamp was defective, and the other that, although in good condition

and a proper appliance there was still danger of the plates falling, and of this danger plaintiff was not warned.

There is no competent testimony that a clamp of the kind which was being used was not a proper tool or appliance for doing the work, but it is, and was, insisted that this particular clamp was defective and out of repair because it had too much play around the pivot. The testimony on this point is that the play on this particular clamp was from one-sixteenth to one-eighth of an inch, and that the jaws of the clamp lacked one-eighth of an inch in meeting, but there is no testimony that it was worn at this point, and the evidence shows that the play around the pivot was not unusual. Indeed, we think the testimony fails to show any defect in the clamp itself. It is true that in this particular case it did not hold the sheet, but this may have been due to many causes. First, the clamp may not have been of proper size for handling the sheet which was being unloaded. Second, the plate may not have been inserted far enough into the jaw. Third, the employees may have been negligent in not inserting blanks or wedges. Fourth, the slipping may have been due to the presence of some foreign material, to the consistency of the jaws, or of the sheet of steel which was being removed.

Plaintiff's counsel insist that, as the sheet fell, this in itself, in view of the circumstances, was evidence of the defective character of the clamp. The doctrine of *res ipsa loquitur* does not ordinarily apply to actions by servants against their masters, although it may in some cases as in *Huggard v. Glucose Co.*, 132 Iowa, 724. But where so many causes may have operated for one of which defendant, the master, may be responsible, and for others not liable, the maxim *res ipsa* does not apply. And in such a case, if nothing more than the happening of the accident

1. MASTER AND  
SERVANT:  
injury to ser-  
vant: defective  
machinery:  
evidence.

2. SAME: burden  
of proof:  
*res ipsa*  
*loquitur*.

be shown, plaintiff has not made out his case. Moreover, if the circumstances surrounding the case do no more than indicate a possibility of the accident happening because of a defective appliance, or if they are no more consistent with the theory that the accident was due to some defect but equally explainable on some other theory than the one charged, then plaintiff has not made out his case. The reason for this is that the burden is upon the plaintiff, not only to show some defect for which the master was responsible, but also to show that this defect was the proximate cause of the injury. These principles are well established by authority. See, as sustaining them, *Kuhns v. Railroad*, 70 Iowa, 561; *Croft v. Railroad*, 134 Iowa, 411; *Siegel v. Railroad*, (Mich.) 125 N. W. 6; *Byrce v. Railroad*, 119 Iowa, 274; *Neal v. Railroad*, 129 Iowa, 5; *Haden v. Railroad*, 99 Iowa, 735; *Tibbitts v. Bryce v. Railroad*, 119 Iowa, 274; *Neal v. Railroad*, 129 Iowa, 636; *Rush v. Murphy Co.*, 135 Iowa, 376; *O'Connor v. Railroad*, 83 Iowa, 105. Also, 2 Labatt on Master & Servant, section 837; *Donaldson v. Railroad*, 188 Mass. 484; *Voight v. Car Co.*, 112 Mich. 504 (70 N. W. 1103); *Dobbins v. Brown*, 119 N. Y. 188 (23 N. E. 537); *Schultz v. Railroad*, 116 Wis. 31 (92 N. W. 377); *Patton v. Tex. R. R.*, 179 U. S. 658 (21 Sup. Ct. 275, 45 L. Ed. 361). Now, it is apparent from the testimony adduced that the accident may have happened from many causes aside from the use of a defective clamp, and, remembering that there was absolutely no direct evidence that the clamp was defective, it necessarily follows that the trial court was in error in submitting the issue of defective clamp to the jury.

II. In instructions nine and ten the jury was told that, if defendant did not use ordinary care in supplying and using the clamp in question for the purpose of lifting the plate, then it was liable. In view of the uncontradicted testimony that there were a sufficient

number of clamps of different sizes supplied by defendant for lifting the plates, and that when plates were thin the men wedged the sheets in with blanks, these instructions made the defendant liable for the manner in which the clamps were used by plaintiff's co-employees and to this extent the instructions were erroneous. The same complaint is made of instruction eleven and we think it is vulnerable to the charge that it made defendant liable for the negligence of plaintiff's co-employees in selecting the wrong clamp.

III. The testimony was sufficient to justify the submission of the second ground of negligence, to wit, defendant's failure to warn plaintiff of the dangers incident to the use of the clamps. There was considerable testimony to the effect that plates or sheets had fallen while being handled with these never slip clamps. If this plaintiff had no knowledge and was not warned thereof before undertaking the work, there was a duty on the part of the master to warn under the facts disclosed by this record. Plaintiff was inexperienced, and should not be held to the duty of knowing such dangers. Defendant did not warn him thereof, or at least there is a conflict in the testimony with reference thereto, and the case on this issue was properly submitted. Some of the instructions bearing thereon are not as clear perhaps as they might have been in failing to distinguish between the dangers incident to the use of the particular clamp and to dangers incident to the use of such clamps in general.

Wiggers was plaintiff's fellow servant in doing the actual work of unloading the car and in selecting and using the clamp; and was defendant's vice principal for the purpose of giving warning to the plaintiff of the dangers incident to the doing of the work in a proper and careful manner.

3. SAME: negligence of coemployees: instructions.

4. SAME: negligence: duty to warn: evidence.

5. SAME: fellow servant: vice-principal.

For the performance or nonperformance of the latter duty defendant was responsible; but for the negligent performance or nonperformance of the former duties defendant was not responsible.

Instruction No. 22, given by the trial court, allowed the jury to find for plaintiff if any negligence on the part of the defendant was shown without confining this negligence to the charge made in the petition. In this respect it was erroneous. *Canfield v. Railroad*, 142 Iowa, 658; *Ramsey v. Railroad*, 135 Iowa, 329; *Edwards v. City*, 138 Iowa, 421. We should not reverse for this ground alone, but call attention to the error that it may not be repeated upon a retrial.

IV. Testimony was adduced tending to show that plates had previously fallen while being handled with clamps of the type used on the day in question. This was objected to by defendant, but the objections were overruled. There was no error here. This testimony was clearly admissible to show defendant's knowledge of the danger in the use of these clamps, and its duty to warn plaintiff of these dangers. The testimony shows that these were proper clamps to use, but, if in their use there was danger of the plates falling, it was defendant's duty to warn plaintiff of this danger, unless he knew thereof. There is testimony that he had no such knowledge and the evidence was clearly admissible. Appellant's counsel misapprehend the object of this kind of testimony and the cases cited by them are not applicable. As sustaining our conclusions on this branch of the case, see *Klaffke v. Axel Co.*, 125 Iowa, 225; *Byard v. Palace C. Co.*, 85 Minn. 363 (88 N. W. 998); *Cushman v. Fuel Co.*, 116 Iowa, 618 (88 N. W. 817); *Myers v. Iron Co.*, 150 Mass. 125 (22 N. E. 631, 15 Am. St. Rep. 176).

For the errors pointed out, the judgment of the dis-

6. NEGLIGENCE:  
instructions.

7. SAME: knowl-  
edge of dan-  
ger: duty to  
warn: evi-  
dence.

strict court must be, and it is, reversed, and the cause remanded for a new trial.

*Reversed and remanded.*

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GAIL H. DOW, Appellee, v. DES MOINES CITY RAILWAY  
COMPANY, Appellant.

**Evidence:** LEADING QUESTIONS: HARMLESS ERROR. In this action for  
1 injury to plaintiff because of the alleged negligent operation of  
a street car, the plaintiff was asked a leading question, which was  
objected to, but the court without ruling upon the objection asked  
plaintiff a question, to which defendant excepted, but which plain-  
tiff answered; and it is held that there was no error of which  
the plaintiff could complain, as the court's interrogatory was not  
objectionable, and it would be a rare case which would demand  
a reversal because of an unanswered leading interrogatory.

**Street railways:** INJURY TO PEDESTRIAN: CONTRIBUTORY NEGLIGENCE:  
2 EVIDENCE: INSTRUCTION. As bearing on the question of care exer-  
cised by plaintiff in going behind a standing street car onto an-  
other track on which a car was coming from the opposite direc-  
tion, it was proper to show that the gong on the coming car was  
defective, although there was no specific charge of negligence in  
that respect; and the court's instruction as given excluded a con-  
sideration of this evidence on the question of defendant's neg-  
ligence as charged in the petition, as effectually as the instructions  
requested and refused.

**Same:** CONTRIBUTORY NEGLIGENCE: INSTRUCTION. The court's instruc-  
3 tion regarding the facts to be considered in determining the ques-  
tion of whether plaintiff was free from contributory negligence  
is held not subject to the objections that it invaded the province  
of the jury, singled out facts favorable to plaintiff, was mislead-  
ing, or incorrect as a statement of the law.

**Same.** In order to recover for injuries received as the result of  
4 defendant's alleged negligence the plaintiff must prove freedom  
from negligence which in any manner contributed to the injury,  
and the instructions in this case plainly advised the jury on this  
subject and directed a consideration of all the facts bearing upon  
this question in determining the same.

**Same:** CROSSING ACCIDENT: CARE REQUIRED OF PEDESTRIANS. The care



5 required of one about to cross a steam railway track does not apply with equal rigidity to one in crossing a street railway track, especially where the street railway is upon a public street which pedestrians have the right to use; and while one may not go heedlessly upon a street car track he need not be constantly on guard for approaching cars, but the degree of care required is that which an ordinarily careful person would exercise under like circumstances for his own safety.

**Same.** In crossing a street railway track a pedestrian has the right  
6 to assume, in the absence of notice or knowledge to the contrary, that cars will be run in accordance with law and custom regarding rate of speed and the giving of signals, and with some reference to the rights of those upon the street; but this rule does not relieve a pedestrian from the exercise of ordinary care and prudence for his own safety.

**Same: CONTRIBUTORY NEGLIGENCE: EVIDENCE.** The plaintiff in this  
7 action had crossed the street to post a letter in the mail box of a car, and while recrossing the street and just after stepping out from behind this car was struck by another car on the other track, and the evidence is held to require a submission of the question of her contributory negligence in failing to observe the approaching car.

*Appeal from Polk District Court.*—HON. JAMES A. HOWE,  
Judge.

THURSDAY, JUNE 16, 1910.

ACTION at law to recover damages for injuries received by plaintiff due to being struck by a car upon defendant's line of road. Defendant denied any negligence on its part and pleaded that plaintiff was guilty of contributory negligence. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. *Affirmed.*

*Guernsey, Parker & Miller*, for appellant.

*W. C. Strock* and *Thomas A. Cheshire*, for appellee.

DEEMER, C. J.—Defendant is a corporation operating

a street railway system in the city of Des Moines. Its Ingersoll Avenue Line running east and west through a residential district is double tracked; west-bound cars taking the north, and east-bound the south tracks. These tracks are standard gauge, to wit, four feet eight and one-half inches, and the distance between the two tracks is five feet six inches. The cars which ran over these lines were from eight feet to eight feet and two inches in width. All the cars on defendant's line carried United States mail boxes, and the public was invited to stop them at street crossings for the purpose of depositing mail in these boxes. Defendant's Ingersoll Avenue Line crosses streets running north and south and numbered from Seventeenth to Thirty-Ninth inclusive. At the intersection of Twenty-Ninth and Ingersoll Avenue, there was at the time of the accident in question a small frame structure at the southwest corner of the street intersection used by persons contemplating passage upon defendant's cars as a waiting station. From Thirty-Fourth Street east to Twenty-Eighth there is a downgrade varying from one and one-third to four and one-ninth percent. Nine hundred and seventy feet and a fraction west of the west side of Twenty-Ninth Street at its intersection with Ingersoll Avenue is the beginning of a curve in defendant's line of road. This is a three percent curve. The grade of the tracks from the east end of this curve to Thirtieth Street is four and one-ninth percent; from Thirtieth Street to Twenty-Ninth it is one and seventy-five-one-hundredths percent; and from Twenty-Ninth to Twenty-Eighth two and nine-tenths percent. The grade of the curve is three and two-thirds percent. This curve, as we have said, begins nine hundred and seventy feet west of Twenty-Ninth Street and two hundred and sixteen feet west of Thirtieth Street. From any point north of the waiting room and south of the north track on Twenty-Ninth Street there is a plain view of cars approaching from the west

of from one hundred to one hundred and five rods. There were many houses on both the north and south sides of Ingersoll Avenue; but these did not obstruct a view of cars approaching from the west for the distance indicated.

At the time of the accident plaintiff, who is a married woman, was living two blocks south of Ingersoll Avenue and one block east of Twenty-Ninth Street. She left her home at half-past four or a quarter to five p. m. February 24, 1908, to post a letter on one of defendant's cars, and went to the intersection of Twenty-Ninth Street with Ingersoll Avenue. A drizzling rain was falling, and she carried an umbrella to shield herself therefrom. As she approached the avenue, she could see a car passing thereon for a block and one-half south of said avenue, and she saw no cars pass the crossing which she was approaching on the day in question. The schedule time for cars at that time was every seven or eight minutes. As we have said, the day was cloudy, and it was raining, and plaintiff went to a point north of the waiting station, where she had a clear view of defendant's track both east and west—westward for the distance already indicated. Here she stopped and looked westward for an approaching car, standing there for two or three minutes. Discovering no car approaching, she looked toward the east and discovered one approaching from that direction, which was then somewhere between Twenty-Eighth and Twenty-Ninth Streets. She immediately crossed all the tracks and waited for the west-bound car to pass her and to stop, either to receive her letter, discharge passengers, or both. This west-bound car stopped on the west side of Twenty-Ninth Street in such position that the door, which was in the center of the car, was on the west side of Twenty-Ninth Street and just opposite the place where she was standing. As the mail box was on the rear of the car, plaintiff immediately proceeded to the east end of the car and there deposited her letter in the box. The west-bound car then

started, and plaintiff, at the same time, proceeded in a southern or southwesterly direction to recross the tracks, when she was struck by an east-bound car and received the injuries of which she complains. There is testimony that this east-bound car was running at least twenty-five miles per hour, and also to the effect that it threw plaintiff something like eighty-six feet. She might have gone farther but for the fact that she was thrown against and struck a boy who was walking westward on Ingersoll Avenue. The car also ran from three hundred to four hundred feet after it struck plaintiff before it could be stopped.

The negligence charged against the defendant is as follows:

(1) That the motorman on the east-bound car which struck the plaintiff was negligent in that he ran his car by the car, which had stopped to discharge passengers, at a rate of speed exceeding three miles per hour. (2) That the motorman on the east-bound car was negligent in that he ran his car down a descending grade without having such car under perfect control. (3) That the motorman on the east-bound car was further negligent because he failed to sound his gong for a distance of fifty feet west of the front end of the west-bound car, until he had passed the west-bound car. (4) That the motorman on the east-bound car was further negligent in that he passed the intersection of Twenty-Ninth Street and Ingersoll Avenue at a rate of speed prohibited by the ordinance of the city of Des Moines regulating the speed of his car and limiting its speed to twelve miles per hour. (5) The motorman on the east-bound car was negligent in that he failed to exercise ordinary care in running his car at a proper and lawful rate of speed at the time the plaintiff was struck and injured by said car.

In her petition plaintiff also made the following, among other, allegations:

That on the day she was injured, and for a long

time prior thereto, there was a general custom prevailing among motormen on the cars of the defendant railway company that, when a car on a parallel track passed another car which had stopped to discharge passengers at a street crossing, the passing car would slow down to a speed of not to exceed three miles an hour, and the motorman ring his gong from the time the moving car was within fifty feet of the front end of the standing car until he passed, and that the plaintiff knew of this custom. . . . That at the time plaintiff was injured, and for some years before, there was a general custom prevailing among the motormen of the defendant railway company that, when their cars were going down descending grades, the motorman would hold the car under perfect control at all times, which custom was known to the plaintiff. That at the time and for a long time prior to the date of the plaintiff's injury, there had prevailed among the motormen of the defendant railway company a general custom to sound their gongs before crossing intersecting streets, and cross-walks, and hold their cars under perfect control, which custom was known to the plaintiff. Plaintiff further states that at the time of her injury, and for a long time prior thereto, there had prevailed among the motormen of the defendant railway company a general custom to stand at their levers, attend strictly to their duties, and use the utmost care to prevent any kind of an accident to passengers getting off or on the cars of the defendant, or to persons crossing the streets or in any other way liable to be injured by the cars of the company, which custom was known to the plaintiff.

Plaintiff introduced an ordinance of the city of Des Moines prohibiting the running of cars at the point in question at a greater speed than twelve miles per hour, and also produced testimony to prove the customs pleaded by her.

Under the facts disclosed, there can be little if any, doubt of defendant's negligence. Indeed, if there were nothing more in the case than excessive rate of speed, that would be enough, under the circumstances shown,

to take the case to the jury on the question of defendant's negligence.

II. Reversal is sought on the ground of claimed errors of the trial court in the admission and rejection of testimony, and in the giving and the refusal to give certain instructions, and it is strenuously insisted that under the undisputed testimony plaintiff was guilty of contributory negligence as a matter of law and should not be allowed to recover for the consequences of the collision. We shall first take up the rulings on the admission and rejection of testimony. It is claimed that the court erred in permitting plaintiff's counsel to propound certain leading questions to his witnesses. A question somewhat leading in form was propounded by counsel to plaintiff herself which was objected to by defendant's counsel. Without ruling upon the objection, the trial court propounded this question to the witness, which was answered as shown: "By the Court: State the fact as to where you looked. (Defendant excepts.) A. I looked just as I crossed the track." There was no error here of which defendant may justly complain. The interrogatory propounded by the court was not objected to, and had it been, the objection would have been without merit. Moreover, it is a rare case indeed which will be reversed because a leading question is propounded but not answered.

Although defendant was not charged with having a defective gong on its east-bound car, plaintiff was permitted to prove, over objections, that the gong upon this car was defective. We think this testimony was admissible as bearing upon the question of plaintiff's care in going from behind the west-bound car and onto the south track upon which the east-bound car was approaching. There was a dispute in the testimony as to whether the gong on this latter car was rung at all as

1. EVIDENCE:  
leading ques-  
tions: harm-  
less error.

2. STREET RAIL-  
WAYS: injury  
to pedestrian:  
contributory  
negligence:  
evidence:  
instruction.

it approached Twenty-Ninth Street. And if the gong was so defective that it could not be rung, or if rung that it could not be heard, the fact was material as bearing upon plaintiff's care in going upon the south track behind the west-bound car.

In this connection defendant asked the following instruction, which the trial court refused to give:

You are instructed that some evidence has been introduced tending to show that the bell or gong on the east-bound car was somewhat defective. In regard to this matter, you are told that there is no charge in the plaintiff's petition that the defendant was negligent by reason of having a defective gong on the car, or by reason of the fact that the said gong was out of repair, and you will therefore not consider the evidence with respect to the defective gong as bearing upon the acts of negligence charged in plaintiff's petition, nor would you be warranted in basing your finding of negligence upon the fact, if it be a fact, that said bell was defective.

The instructions of the trial court on this point, so far as material, are as follows:

The plaintiff, in her petition, alleges that the defendant was negligent in the following respects: (1) In that the motorman on the east-bound car ran said car past the intersection of Twenty-Ninth Street and Ingersoll Avenue at a rate of speed prohibited by the ordinances of the city of Des Moines regulating the speed of street cars and limiting the speed of such cars to twelve miles an hour; (2) in that the motorman on the east-bound car ran said car at a greater rate of speed than was proper in the exercise of ordinary care, at the time when, and the place where, the plaintiff was injured; (3) in that that the motorman on the east-bound car failed to sound the gong on said car as said car approached and passed the west-bound car at the intersection of Twenty-Ninth Street and Ingersoll Avenue at the time of the accident. It was the duty of the defendant, in the operation of the car in question, to exercise ordinary care, and a failure

on its part to exercise such care, as charged by the plaintiff in her petition, would constitute negligence. . . . In determining whether the defendant was negligent, you will consider only the acts charged by the plaintiff as negligence, set forth and enumerated in the last preceding instruction, that have been proven, if any, as was the proximate cause of the injury to the said Gail H. Dow. . . . If the plaintiff has not so established such negligence, if any, of the defendant, and that the injury to the plaintiff was the direct result of such negligence, so charged, set forth, and proven, if so proven, then there can be no recovery in this case.

It seems to us that the instructions given quite as effectually eliminated the thought that the defective gong might have been considered by the jury as a part of the negligence charged as the instruction asked.

III. Peremptory instructions directing the jury to find for defendant because of plaintiff's contributory negligence were asked by appellant's counsel and refused. This ruling is challenged; but consideration thereof will be deferred until we reach the subject of plaintiff's conduct at and just before the time of the accident. Instructions ten and eleven given by the trial court are complained of. They read as follows:

(10) In determining whether the plaintiff was guilty of any negligence which in any way contributed to her injury, you will consider the definitions of 'ordinary care,' 'negligence,' and 'contributory negligence'

3. SAME:  
contributory  
negligence:  
instruction.

elsewhere given you in these instructions, and you will consider, as shown by the evidence: The place where the plaintiff was injured and the surroundings thereabout; where the plaintiff came from, where she was going, and the manner thereof; the number of street railway tracks on said street at said place; whether plaintiff, before crossing said tracks from the south to the north side thereof, and before attempting to recross said tracks, looked to the westward; the distance a car approaching from the west, on the south track, could have been seen from the place where plaintiff



was at and immediately before the time she crossed or attempted to cross said tracks; whether plaintiff did or did not see the car approaching on said south track at said time; what the plaintiff thereafter did, and the length of time which thereafter elapsed before her injury; the general custom and usage, if any, at the time of the accident in question, of motormen on moving cars, in relation to sounding the bell or gong, or slackening the speed of such cars, on passing a standing car loading or unloading passengers, or a car just starting from a stop, at street intersections; what the plaintiff knew, if anything, in relation to such custom and usage, if any, and whether she relied thereon; what plaintiff was doing; whether the plaintiff was using and exercising the senses, with which she was endowed by nature, as required in the exercise of ordinary care; what the plaintiff knew, or in the exercise of ordinary care should have known; what the plaintiff did, or in the exercise of ordinary care should have done; together with any other facts or circumstances shown in this trial showing, or tending to show, whether the plaintiff was guilty of any negligence contributing to her injury.

(11) If the plaintiff, at the time and place in question, before crossing defendant's street railway tracks, looked to the westward for an east-bound car, and there was none in sight, though she was able to and did see for such a distance along the south track of the defendant company that a car coming from the west on said track, at a lawful rate of speed, could not have arrived at the place where she was injured at the time of her injury, nor until she would have had time to recross said south track in safety, had she not been injured, then, in that event, in the absence of notice or knowledge to the contrary, the plaintiff might, in the exercise of ordinary care, presume that a car from the westward, if approaching, would do so at a lawful rate of speed. The plaintiff also, in the absence of notice or knowledge to the contrary, had a right to presume that the motorman on said east-bound car would not run said car at a greater rate of speed than was proper in the exercise of ordinary care, and that said motorman would sound the gong on said car as required in the exercise of ordinary care. And

the defendant had a right to presume that the plaintiff, in crossing or recrossing or attempting to recross its tracks, would use and exercise the senses with which she was invested by nature, such as the senses of seeing and hearing, as required in the exercise of ordinary care, and that she would, in all other respects, exercise ordinary care on her part.

The objections to these are: "First, they invade the province of the jury; second, they single out the concrete facts favorable to plaintiff, and fail to single out such facts growing out of the same transaction, as were favorable to the defendant's theory; third, they are misleading; fourth, they give undue prominence to the facts on which plaintiff relies to recover; fifth, they do not state the law applicable to the case correctly."

As opposed to the eleventh instruction given, defendant asked the following:

(16) The mere fact, if such you find the fact to be, that the plaintiff, before she crossed to the north side of the tracks and before the west-bound car had reached the crossing and had stopped, looked to the west to see whether a car was approaching, would not, in itself, be sufficient to warrant you in finding that the plaintiff was free from contributory negligence.

(17) Unless you find from the evidence that, under the circumstances disclosed by the testimony in this case, a person of ordinary care and prudence would not have looked to see whether a car was approaching from the west after starting across to the north side of the tracks before the west-bound car had reached the crossing in question and before the letter in question had been mailed, the plaintiff has failed to show that she exercised ordinary care, and your verdict in this case should be for the defendant.

It also asked these instructions:

(18) Ordinary care requires one about to cross a street railway track to use his senses to ascertain whether

he may safely do so, and this must be done at a time and place when it will enable one to determine by the information so acquired whether it will be safe to make the crossing in question. In the case at bar it appears from the testimony of the plaintiff that she did not use her senses to ascertain whether or not the car which it is alleged caused the injury complained of was approaching after she left the south side of the tracks and passed in front of the west-bound car, intending to mail her letter upon that car and return. You are instructed that her failure to use her senses to ascertain whether a car was approaching at a time which would enable her to determine whether it would be safe to cross the south track in returning was such a lack of ordinary care upon her part as precludes a recovery in this case.

(8) While the plaintiff has the right to presume the defendant, in the operation of its cars, would not be negligent, still this fact does not relieve the plaintiff from exercising care on her part, nor from using her senses of seeing and hearing for the purpose of avoiding accident, and even though you may find that the defendant was negligent in one or more of the particulars charged in plaintiff's petition still if the plaintiff failed to exercise reasonable care on her own part for her own safety, and such lack of care contributed in any degree to her injury, she can not recover.

Other instructions were also asked which need not be set out, as enough have been given to disclose the points relied upon.

The tenth instruction, being the first one copied in this division of the opinion, is not vulnerable to the objections lodged against it. It does not invade the province of the jury or single out facts favorable to plaintiff. It is not misleading, nor is it incorrect as a statement of the law. It is such an instruction as should have been given, and as we read it impartially directs the jury regarding the facts to be considered in determining whether or not plaintiff was free from contributory negligence.

In the first, tenth, and thirteenth instructions given

by the trial court the jury was instructed that plaintiff could not recover unless she show that she did not by her own negligence contribute to her injury.

4. SAME.

We here quote the following excerpt from the tenth instruction bearing upon this subject: "You will determine whether there was any negligence on the part of plaintiff, which, in any degree, contributed to her injury. That the plaintiff was free from contributory negligence she is required to prove, and the law is that where one is injured in any manner, and his or her own negligence has contributed, in any way to such injury, no recovery can be had therefor, although there may have been negligence on the part of the defendant without which such injury would not have occurred." The following also is reproduced from the thirteenth instruction: "A street railway crossing is a place of danger, and every one who uses it is presumed to know such fact, and is required to exercise ordinary care to avoid accidents. It is the duty of such person or persons to refrain from any act of negligence." It is needless to say that these instructions plainly told the jury that plaintiff was required to show her freedom from negligence which in any manner contributed to her injury, and that the jury should consider all the facts recited in the first instruction complained of in determining that question.

The eleventh instruction is the one which is most seriously challenged, and that goes to the very heart of the case. It is entitled to careful consideration at our hands. Defendant's counsel seriously and ably contend that this instruction is an inaccurate statement of the law, and that it runs counter to the doctrine of the following cases: *Ames v. Waterloo Co.*, 120 Iowa, 640; *Beem v. Electric Co.*, 104 Iowa, 563; *Artz v. Railroad Co.*, 34 Iowa, 153; *Payne v. Railroad*, 39 Iowa, 523; *Stanley v. Railroad Co.*,

5. SAME: crossing  
accident: care  
required of  
pedestrians.

119 Iowa, 526; *Orr v. Railroad Co.*, 94 Iowa, 423; *Bloomfield v. Railroad Co.*, 74 Iowa, 607. We may as well eliminate the cases against steam railways, for it is now the rule of this court, many times announced, that the care required of one about to cross the track of a railway operating heavy trains by steam at a high rate of speed does not apply with equal rigidity to the crossing of a street railway track. And this is especially true where the street railway is laid upon a public street where pedestrians and travelers have a right to be. See the *Orr* and *Beem* cases, *supra*; *Perjue v. Light Co.*, 131 Iowa, 710; *Ward v. Light Co.*, 132 Iowa, 578; *Doherty v. Railway Co.*, 144 Iowa, 26; *Powers v. Railway Co.*, 143 Iowa, 427; *Kern v. Railway Co.*, 141 Iowa, 620. The rationale of the rule is well expressed in *Lynum v. Union Ry. Co.*, 114 Mass. 83, from which we quote the following: "The cases relating to injuries suffered by being struck by a locomotive engine at a railroad crossing afford no test of the degree of care required of the plaintiff in this case. The cars of a horse railway have not the same right to the use of the track over which they travel, do not run at the same speed, are not attended with the same danger, and are not so difficult to check quickly and suddenly, as those of an ordinary railroad corporation. A person lawfully traveling upon the highway is not therefore bound to exercise the same degree of watchfulness and attention to avoid the one as to keep himself out of the way of the other."

It is not to be understood, however, that we have in any manner relaxed the rule requiring the exercise of ordinary care by one who is about to cross or go upon a street railway track. As said in the *Reem* case, *supra*, "It is true, as contended by the appellant, that it is the duty of persons in charge of a street car to be watchful and diligent to avoid doing injury to others; but persons

who cross street railway tracks also have duties to perform. They can not assume that, without care on their part, they will be seen, and protected from harm, and the car stopped, if necessary, to avoid a collision. They are not, as a rule, required to use the same degree of care as would be required if they were about to cross an ordinary commercial railway track. *Orr v. Railway Co.*, 94 Iowa, 426. But street cars are usually operated according to established time schedules, and their efficiency and value to the public demand that they be so operated. To require, whenever a person approaches the track, that they be stopped, or the speed slackened, until it is evident that the person will not be endangered by the running of the cars, would be to impose a serious, and in many cases an intolerable, burden upon the railway corporation, and subject its patrons to annoying and injurious delays, without any substantial reason for so doing, or benefit of importance to any one. Ordinarily, a pedestrian who approaches a street railway track may, and does, without appreciable effort or loss of time, ascertain if a car be near, and it is his duty to do so."

We have never held that one may go heedlessly and blindly upon a street car or other track and still be free from contributory negligence. But we have never said, even in steam railway cases, that one must be constantly on guard for approaching trains or cars. The degree of care required of him is not the highest, but ordinary, care and prudence, and whether or not he exercised such care is ordinarily a question for the jury—dependent largely upon the circumstances of each particular case. To go upon the track of either a steam or street railway without exercising any care for his safety is negligence, and such negligence will prevent a recovery. But it is not necessary that one keep his eyes constantly upon the track, or that he stop and listen or do more than an ordinarily careful person would under

the circumstances. In the steam railway case of *Winey v. Railroad Co.*, 92 Iowa, 622, we said:

The words we have italicized make it the duty of a person to look and listen for approaching trains at all points in his passage, and hold him guilty of contributory negligence if he fails. This rule is too broad: First, because it usurps the province of the jury; and, next, because it requires the traveler to keep his eyes constantly upon the track for trains at all points leading to its passage, whether the view of the track is obstructed or not. The rule, no doubt, is that if the traveler, having looked and listened without seeing or hearing an approaching train within a reasonable distance of the crossing, is, by reason of a neglect of the railroad company to blow the 'statutory' whistle, run upon and injured, liability attaches therefor; and if the view of the track is obstructed by any means, so as to render it impossible or difficult to learn of the approach of a train, or there are complicating circumstances calculated to deceive or throw a person off his guard, then whether it is negligent on the part of the traveler who fails to look and listen is a question of fact for the jury to determine from the circumstances of each particular case.

Again, in the steam railway case of *Moore v. Railroad Co.*, 102 Iowa, 595, we said, in speaking of the duties of one about to cross a steam railway track:

The law does not declare that a person about to go upon a railway crossing must look and listen, or stop and listen, at any particular time or place, but at the time and place that the exercise of ordinary care requires. These well-recognized rules are not questioned, and we need not refer to any of the many authorities cited in the arguments. . . . An ordinance of the city provides that locomotive engines, shall not be run within the city limits at a greater rate of speed than six miles per hour, and that the bell shall be rung on approaching street crossings and when any person or animal may be upon the track. While these requirements did not relieve the plaintiff from the exercise of ordinary care, nor from

the duty of looking and listening, they, and the presumption that they would be observed, are proper to be considered in determining whether the plaintiff was negligent. He had no reason to expect the engine or train to pass from one direction more than from the other; hence it was his duty to look in both directions. He had a right to presume that no engine would be run at a greater speed than that prescribed in the ordinance, and that the bell would be rung at crossings as required. We have seen that, if plaintiff had looked west when about forty feet south of the crossing, he must surely have seen the approach of this engine in time to have stopped and avoided the accident. The contention is that he was negligent in not again looking west after he passed the point sixty feet south of the track. We do not think it should be said, as a matter of law, that plaintiff was guilty of negligence in not again looking westward after he passed the point sixty feet south of the track. He had looked westward at Shaw street, and from the sixty-foot point, and saw nothing. It was his duty to look east as well as west, and he did so. While we do not say that the plaintiff was not negligent, we do not think that it should be said, as a matter of law, that he was. Whether, in view of all the circumstances under which he acted, he was negligent, is a question about which we think men may honestly differ, and therefore one that should have been submitted to the jury. Counsel present calculations based upon estimates of time, the speed of the engine and horse, and measurements of distance, to show that the plaintiff was, or was not, negligent. Such estimates are not usually exactly correct, but mere approximations, and it should be left to the jury to determine what basis, if any, they may afford for a conclusion.

Certainly no more stringent rule should be applied to the crossing of street railway tracks. It is said in the last cited case and in the *Perjue* and *Ward* cases,

*supra*, that one about to cross a railway  
6. SAME. or street railway track has the right to assume that ordinary precautions would be taken for his safety by the person in charge of the car and that cars



would not be run negligently or in violation of express statutes or ordinances. Surely one about to cross a street railway track has the right to assume that he will not recklessly be run down and injured. He has the right to assume, in the absence of evidence to the contrary, that cars and engines will be run according to law and custom, and with some reference to his rights as a traveler or pedestrian, upon the street. This rule does not, of course, absolve him from all care for his own safety. He must still exercise the ordinary care and prudence required of him to avoid injury; but, in determining whether or not he exercised it, he has the right to assume that the steam or street railway company will not violate the law. The instant case is not one where plaintiff did not look at all. The testimony shows that she did look just before crossing over the north track of defendant's road, and that if the car which struck her had been coming at a proper rate of speed she would have seen it. As it was, the car was beyond the range of her vision, and a jury was justified in finding that it came down to Twenty-Ninth Street at a high and dangerous rate of speed without any warning and without slowing down as it approached the west-bound car, which had stopped to discharge passengers and to allow plaintiff to mail her letter. She says that she did not see any car approaching from the west as she started to cross the north track of the defendant railway company, and the jury was justified in believing that she could not have seen it. If it had been running at a proper rate of speed, she would or should have seen it, and doubtless this accident would not have occurred. The instruction complained of is in line with the cases we have cited, and, notwithstanding the forcefulness of appellant's argument for a departure from these rules, we are not disposed to do so, although perhaps some of the language used in one or two of these opinions is a little broader than the

writer would care to again indorse. As will be noticed, most of the instructions asked by defendant's counsel run counter to the views herein expressed, and were therefore rightly denied. In so far as they announced correct rules, they were in effect given by the trial court in its charge to the jury. Our conclusions find support in the following, among other, cases from foreign jurisdictions: *Wahlgren v. Railway Co.*, 132 Cal. 656 (62 Pac. 308, 64 Pac. 993); *Dallas Co. v. Hurley*, 10 Tex. Civ. App. 246 (31 S. W. 73); *Driscoll v. Railway Co.*, 97 Cal. 553 (32 Pac. 591, 33 Am. St. Rep. 203); *Evansville Co. v. Gentry*, 147 Ind. 408 (44 N. E. 311, 37 L. R. A. 378, 62 Am. St. Rep. 421); *Terien v. Railway Co.*, 70 Minn. 532 (73 N. W. 412); *Peterson v. Railway Co.*, 90 Minn. 52 (95 N. W. 751); *Consolidated Co. v. Glynn*, 59 N. J. Law, 432 (37 Atl. 66); *Chicago Co. v. Fennimore*, 199 Ill. 9 (64 N. E. 985); *Henderson v. United Co.*, 202 Pa. 527 (51 Atl. 1027); *Newark v. Block*, 55 N. J. Law, 605 (27 Atl. 1067, 22 L. R. A. 374) (this case being closely in point); *Smith v. Trunk Line*, 18 Wash. 351 (51 Pac. 400, 45 L. R. A. 169); *Fonda v. St. P. R. R.*, 71 Minn. 438 (74 N. W. 166, 70 Am. St. Rep. 341); *McClain v. Brooklyn Co.*, 116 N. Y. 459 (22 N. E. 1062).

IV. The last proposition relied upon for a reversal is that plaintiff was guilty of contributory negligence as a matter of law in failing to look before going to the north side of the tracks and in failing to look before recrossing the south track. As to the first proposition, plaintiff testified that she did look just before she crossed the track to the north side and saw no car. There was some testimony in support of this claim, and some to the effect that she did not look, or if she did that she saw the car coming. A jury was justified in finding that she looked, and that she did not see, and could not have seen,

7. SAME:  
contributory  
negligence:  
evidence.

the east-bound car. This was enough to take the case to the jury on this proposition. Whether or not she should have looked again before recrossing the tracks is a more doubtful question. That she did not look farther than her line of vision would permit from her position at the rear of the west-bound car is quite clear. But, as already indicated, a jury may have found that, while she was carrying an umbrella, it was raised far enough above her head so that she might have looked; that the west-bound car obstructed her view; and that the motor-man in charge of the east-bound car did not sound the gong, slow down his car, or do anything to warn persons who might be attempting to cross the track or to save them from danger. Having looked just before crossing the tracks to the north, it was for the jury to say whether or not plaintiff should have waited until the west-bound car had passed far enough away so that she might have seen the east-bound car or taken some other precautions for her safety. Upon this proposition the excessive speed of the east-bound car, which is practically conceded, becomes a very material consideration. We think this whole matter of plaintiff's contributory negligence was for the jury, and that the court properly submitted that issue as a mixed question of law and fact. Regard must be had of the fact that the west-bound car made considerable noise in starting, and that according to the testimony it was in such position that plaintiff could not see the east-bound car until it was directly upon her. The testimony shows that two men alighted from the west-bound car, and that they started south immediately after the west-bound car started, heard no car from the west, and narrowly escaped a collision with the car which struck and injured plaintiff. One of them was within three or four feet of plaintiff and within one foot of the east-bound car when it struck her. This man heard

no noise of the approaching car and did not see it until he was pulled back by his companion.

We discover no prejudicial error in the record, and the judgment must be, and it is, *affirmed*.

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H. H. SAWYER, Plaintiff, v. WM. HUTCHINSON, Judge  
et al., Defendants.

**Intoxicating liquors: CONTEMPT: EVIDENCE OF ILLEGAL SALE.** In this  
1 contempt proceeding for violating an order restraining the illegal  
sale of liquor the evidence is held to show, without substantial  
conflict, that sales were made to minors in violation of the order.

**Same: CONTEMPT: FILING OF EVIDENCE: DISMISSAL OF PROCEEDING.** Al-  
2 though the court can not commit one for contempt until the evi-  
dence has been made of record as provided in Code, section 4466,  
still it should not dismiss the proceeding for the reason that the  
evidence was not then of record but should postpone action un-  
til the proper record was made.

THURSDAY, JUNE 16, 1910.

CERTIORARI proceeding in the nature of an appeal  
from an order of the defendant as district judge in dis-  
missing certain contempt proceedings against one J. H.  
Jones. Order *annulled*, and case *remanded*.

*John F. Joseph*, for plaintiff.

*Geo. G. Yeaman*, for defendants.

EVANS, J.—One Jones was a saloon keeper in Sioux  
City. On September 23, 1907, a decree of injunction  
was entered against him. In November, 1909, the plain-  
tiff herein filed an information against him for contempt,

in that he had violated such decree of injunction. Upon a trial had the proceedings were dismissed, and Jones was discharged. A number of specific violations were charged in the information against Jones, and evidence was offered in support thereof. One of such charges was that he had sold intoxicating liquors to minors, and had permitted them to be and remain in his saloon. It was shown by the testimony of four witnesses that on October 15, 1909, one Strevelsky, a boy nineteen years of age, purchased intoxicating liquor in Jones' saloon and in sufficient quantity to become intoxicated therefrom. It also appears that one Crane, another boy nineteen years of age, purchased intoxicating liquor there at the same time, and that both boys purchased it there at other times.

I. In support of the action of the trial court it is urged here that the testimony was conflicting, and that the finding of the trial court upon conflicting evidence as to the facts should not be disturbed here. This argument has no substantial basis in this record. The only evidence offered in defense was that of Cavanaugh, the bartender for Jones, who was alleged to have sold the liquor to the boys. His alleged denial of the testimony on behalf of the plaintiff is as follows: "I don't believe I sold the boys any liquor during 1909. . . . Well, the boys might have come in at some time when there was quite a bunch up at the bar, and pushed in, and I not noticed them; probably stand back, or something, and probably get a drink in that way. Yes, I know them well, two of the boys, and if I had seen them I would not have sold to them." Jones himself did not testify, although it appears by the undisputed testimony that he was present on October 15th when the liquor was sold to the boys. It can not fairly be said that the testimony above quoted presents any conflict of evidence worthy of consideration.

1. INTOXICATING  
LIQUORS: con-  
tempt: evi-  
dence of il-  
legal sale.

II. It is further urged in support of the action of the trial court that the case was decided on December 20, 1909, and that the trial court had no authority at that time to order Jones committed for contempt, because the evidence in the case had not been made of record, and the same was not made of record until January 11, 1910. It is argued that, inasmuch as section 4466 of the Code requires that such evidence be made of record before a defendant be committed for contempt, therefore the trial court was bound to discharge the defendant. If this argument could be deemed sound, it would quite circumvent the statute, which imposes upon this court the duty to review such orders of the trial court by certiorari. Granting that the trial court could not commit for contempt until the evidence was made of record, it was its duty to make such evidence of record. It might postpone its action until such evidence was made of record. But it was not authorized to dismiss the proceedings on any such ground. We do not understand from the record that this was the ground upon which the order was made. It should be said that the defendant judge is not urging such point in his own behalf in defense of the proceedings here. As is usual and proper in this class of proceedings, the argument in defense is presented by the attorney of the defendant in the contempt proceedings, and he may properly urge any valid reason why the action of the trial court should be sustained.

Our conclusion is that the trial court was not justified upon the record in dismissing the contempt proceedings, and its order in that respect is annulled and reversed, and the cause is remanded for further proceedings in harmony herewith.

*Reversed and remanded.*

2. SAME: contempt: filing of evidence: dismissal of proceeding.

**ALICE BLOOM, Appellant, v. THE SIOUX CITY TRACTION  
COMPANY, Appellee.**

**Appeal: NOTICE: SUFFICIENCY.** A notice of appeal addressed to the  
1 appellee and his attorneys, service of which is accepted in writ-  
ing by the clerk of court, when filed in his office is sufficient,  
even though the notice is not addressed to the clerk.

**Street railways: INJURY TO PASSENGER: NEGLIGENCE: EVIDENCE.** In  
2 this action for injury to a passenger leaving a street car, who  
passed around the rear of the car, stumbled and fell upon a  
parallel track and was struck by a car coming from the opposite  
direction, the evidence is reviewed and it is held that the ques-  
tions of whether the car, in view of the situation, was being  
operated at a dangerous rate of speed, and whether had it been  
operated at a reasonably safe rate of speed the injury would have  
been averted, were for the jury.

**Same: CONTRIBUTORY NEGLIGENCE.** The evidence is also reviewed and  
3 held to present a question for the jury as to plaintiff's contribu-  
tory negligence.

**Evidence: REVIEW OF RULING: MOOT QUESTION.** Where a witness  
4 affirmatively shows his incompetency to testify on a subject, a  
review on appeal of the ruling rejecting his evidence presents  
only a moot question, and the ruling of the trial court for this  
reason will be sustained.

*Appeal from Woodbury District Court.—HON. J. F.  
OLIVER, Judge.*

THURSDAY, JUNE 16, 1910.

ACTION for damages resulted in a directed verdict  
for defendant, and judgment thereon. The plaintiff ap-  
peals. On rehearing. *Reversed.*

*A. Van Wagenen, for appellant.*

*J. L. Kennedy*, for appellee.

LADD, J.—I. The notice of appeal was not addressed to the clerk of the district court, though as such officer he accepted service in writing thereon, and the notice was filed with him on the same day. Because of the omission of the address, the defendant moves that the appeal be dismissed. Had the address of defendant and its attorneys been omitted, the notice must have been treated as insufficient. *In re Estate of Anderson*, 125 Iowa, 670. Service of notice on the adverse party is exacted for the obvious purpose of informing him that an appeal has been taken in order that he may prepare to meet any objections urged against proceedings in the trial court, but the clerk is neither a party, nor interested, and the design of notifying him is not for his benefit or to enable him to perform some duty, but merely to advise him of the transfer of the cause to the appellate court and to supply his files with evidence of the notice given. Upon filing it with the clerk as exacted by section 4115 of the Code it becomes a part of the records in the case. *Brier v. Ry.*, 66 Iowa, 602. Under a statute similar to that of this state, the Supreme Court of Minnesota held it unnecessary that the clerk be addressed in the notice (*Baberick v. Magner*, 9 Minn. 232, Gil. 217), and later, that the filing in the clerk's office of the notice of appeal with acknowledgment of service by the attorneys of the adverse party indorsed thereon was a compliance with the statute exacting service of such notice on the clerk of the trial court (*State v. Klitzke*, 46 Minn. 343, 49 N. W. 54). In *McManus v. Swift*, 76 Iowa, 576, it seems to have been thought the mere filing insufficient, though acknowledgment of service by a deputy clerk has been regarded as a compliance with the statute liberally construed in *Sanxey v. Iowa City Glass Co.*, 68 Iowa,

1. APPEAL:  
notice:  
sufficiency.



542. See *Wheeler & Wilson Mfg. Co. v. Sterrett*, 94 Iowa, 158; *Cullison v. Lindsay*, 108 Iowa, 126. Possibly it would be going too far to say the mere filing of the notice in the office of the clerk constitutes service on him though no reason appears for requiring more than the filing, and, this being so, there is no ground for holding that the form of the notice should be other than appropriate to advise the adverse party fully and for filing with the papers in the case. No purpose whatever would be served by the insertion of the clerk's name as addressee, and it would seem out of place in that relation. It is enough to serve him with notice addressed to the adverse party. The motion to dismiss the appeal is overruled.

II. One of the defendant's street car lines extends from the business portion of Sioux City to a suburb known as "Morningside." The plaintiff had taken an outgoing car shortly after eleven o'clock in forenoon of April 1, 1908, and when the switch beyond Peter Street was reached it went on a side track behind a car standing thereon which had been crippled, and stopped for another car moving in the opposite direction. The side track was about three hundred feet long, and with the main line ran a little east of a southerly direction. The day was clear, the temperature twenty-three degrees above zero, and the wind blowing from the northwest at a velocity of forty-six miles an hour. The plaintiff resided a short distance south of the next street, and when the car stopped got off and walked as she testified five or six feet, or, as testified by the conductor, ten or fifteen feet back from the rear end of the car, turned to go across the track, when she stumbled on the second rail and fell, striking the left side of her head on the nearest rail of the other track on which a car was then approaching on its way toward the business center. The fender of this

2. STREET RAIL-  
WAYS: injury  
to passenger:  
negligence:  
evidence.

car struck plaintiff's forehead throwing her body parallel with track and causing serious injuries. The negligence charged is that the motorman in operating the passing car, instead of slowing it so as to be under perfect control before reaching the rear end of the standing car as it is said in the exercise of ordinary care he should have done, moved it at a high and dangerous speed, and thereby was guilty of negligence causing the injuries complained of. The trial court in directing a verdict for defendant either held that the evidence was insufficient to carry this issue to the jury, or that the evidence adduced was conclusive as to contributory negligence on the part of plaintiff. In reviewing this ruling, it will be necessary to set out the evidence somewhat in detail. The conductor of the car from which plaintiff alighted testified:

The lady passed, I should judge, about ten or fifteen feet more or less to the rear of my car. It might have been as little as eight feet. . . . When she had fallen I do not think the car which struck her had got to my vestibule yet. I saw it strike her. The left corner of the fender struck her in the forehead. The two cars were about five or six feet apart when they stopped. When we picked her up, she was about ten or fifteen feet to the rear of my car; she had not been moved from the place where she fell. She was simply turned around in about the same place where she fell. She was not dragged any. . . . When she fell I was in the northwest corner of the vestibule. After she had fallen, I glanced around, and the coming car was not quite to the vestibule I was on. In regard to how far the moving car was back or south of the southeast corner of my car, I don't know whether those vestibules are seven or eight feet long. It was the distance of the vestibule, whatever that was.

On cross-examination, the witness said that plaintiff had informed him that she desired to get off at Davis Street (next south of where the car was stopped); that

when she was about to leave the car he warned her to "Look out"; that as soon as she stumbled he started to her assistance; that he got a sweeping glance of the coming car when she fell and saw it coming down close to the rear platform; that as soon as she fell he made an effort to get down and pick her up:

That the other car was right there in a second or so. It was so quick, I could not determine the time. The other car got there before I could. I am a fairly active man. The ground was rough between the rails. At the time her head struck, I had not had time to get off on the ground. I had to face west to get off. I was in the act of getting off when her head struck. . . . It was so quick it is hard to determine, but I saw her fall and saw her head strike. I started to get off the minute I saw her fall, but, before I could get to the ground, she had struck. As I was getting off, I got a sweeping glance of the other car right at my vestibule. As the other car was coming as I started down I got a glimpse of the other car, just as quick as I could turn my head, and my eyesight followed her as much as possible and it was about the time she struck. When I pulled in on the switch, I saw this car coming about one hundred and fifty feet away. My car had been stopped an appreciable length of time.

On redirect examination, he reiterated his statement that the car was not quite to the vestibule when she fell.

A passenger on the passing car testified that he was standing in the vestibule at the left of the motorman, saw the other car pull in on the side track behind the crippled car, that the motorman on the passing car threw the power off about the length of a car and a half before he reached the switch, and threw it on as he was crossing, and, just before reaching the head of the other car, slowed up by applying the air a little, and then released it, and the car increased in speed, moving down-grade; that, when the vestibule of the car on which he was riding was about the middle of the rear car or past,

he saw plaintiff "plunge head foremost into sight. I could see the upper part of her body as she fell down. She fell below my sight. I was standing back in the vestibule and could not see where she hit the ground. . . . I think the car was running at a higher rate of speed before than after he put on the brake but had not time to attain a high rate of speed afterwards."

On cross-examination:

I was standing against the front door of the car proper. I would be five feet from the glass windows in the front of the vestibule or about that. . . . I would not be positive where the front end of the car was when I first saw the woman, but it was about the middle or past the middle of the car she got off of. . . . I was looking ahead, and not paying much attention to the car. . . . When the motorman saw her he reached for the lever. I am not sure that he did not have his hand on it. He did not apply the air instantly. That would be impossible. He applied it as quick as he could. She fell out of my sight, and, at the speed we were going, I should judge she struck the ground about the time the fender reached her.

It was stipulated that the cars were forty feet in length, and it was proven that in passing a standing car it was the practice of defendant to slow the moving car so as to be under perfect control before reaching the rear end of the standing car, to a speed about such as a man walks. It also appeared that plaintiff in passing behind the car had this custom in mind; that people living nearby, including plaintiff, frequently left the car at this place, though not a crossing, walking therefrom to their respective homes. No fault is found with the motorman for not stopping the car promptly after he discovered the peril of plaintiff. The contention is that because of the cars on the side track, and the custom of the company in slowing up and of passengers to alight here, the motorman was operating the passing

car at a dangerous speed. The evidence was such as to carry this issue to the jury. True, there was no opinion evidence of the rate of speed per hour the car was moving but the testimony of both conductor and passenger plainly shows that it was moving very fast. According to the conductor, plaintiff was ten or fifteen feet back of the rear end of the car when she stumbled, and, though he was an active man and started for her rescue immediately, he had not gotten off when the car struck her, having moved from seventeen to twenty-three feet in the meantime. The passenger saw her falling as the end of the passing car was opposite to or a little past the middle of the standing car or some fifteen or twenty feet from its rear end, so that if plaintiff was ten or fifteen feet beyond she must have been from twenty-five to thirty-five feet ahead when the motorman first could have seen her, and yet, according to the passenger, he had but seen her when she disappeared, and he heard the report of the collision. Moreover, the car was moving down-grade, and though the current of electricity was thrown off about sixty feet before reaching the switch, it was turned on in passing over, and though a little air was applied as the car approached the standing car it was removed at once, so that, when the motorman first observed plaintiff, the power was on, with the car gliding rapidly downgrade. The handling of the car as described but confirms the inference which might be drawn from the fact that the collision occurred almost immediately after plaintiff fell, although the car was some distance away. It is not for the court to say what rate of speed would be dangerous in passing at this point. As passengers frequently got off there, defendant was required to operate its cars with this in mind, and that it customarily slowed its cars in passing at that place was a circumstance tending to show that this was the proper thing to do. We are of opinion that whether the car,

in view of the situation, was being operated at a dangerous speed was for the jury to determine, as was also whether had it been operated at a reasonably safe speed the injury would have been obviated.

Was plaintiff guilty of contributory negligence? This, too, was an issue for the jury. Owing to the crippled car, that on which she was riding must have backed out on the main line before resuming its journey.

3. SAME:  
contributory  
negligence.

It was then about halfway between the streets, and she lived but a short distance beyond the next one. She got off as she and the others had often done and walked to the rear of the car. Had she started across immediately behind the car there would be strong ground for holding this contributory negligence, for opportunity to see would have been cut off, and the transmission of sound much obstructed. *Burgess v. Ry.* 17 Utah, 406 (53 Pac. 1013); *McCarthy v. Ry.*, 120 Mich. 400 (79 N. W. 631); 2 Thompson Negligence, section 1461. But she went a considerable distance to the rear, and where, ordinarily, she could see and hear before undertaking to cross. According to her testimony she knew the north-bound car was due, had a faint recollection of having seen it, and had in mind the custom of slowing up in passing. If in this situation she had walked across the space of four or five feet between the tracks and in front of the approaching car, doubtless she must have been regarded as having been negligent. But she had only reached the west edge of the intervening space when she stumbled, and it can not be assumed conclusively that, but for stumbling, she would have walked heedlessly in front of the moving car without observing it. Stumbling was not necessarily negligent, nor can she be said to have been negligent in falling in a dangerous place. The most that can be said is that, if she was intending to cross the track regardless of the passing car, she was intending to do a negligent

act. Such intention, if it existed, was interrupted before she reached the zone of danger and the issue as to whether she was guilty of negligence which contributed to her injury, as said, was for the jury.

Appellant complains of the court's ruling on a tender of evidence of a general custom with reference to slowing cars when passing. It is enough to say with reference to this that the witness by whom it was proposed to prove said custom affirmatively established his incompetency to testify, so that but a moot question was presented, and for this reason the ruling is sustained. It follows from what we have said that the court erred in not submitting the issues to the jury.— *Reversed.*

4. EVIDENCE:  
review of ruling: moot question.

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GUS J. MILLER and CAROLINE MILLER, Appellees, v.  
HENRY KRAMER, Appellant.

**Appeal:** ARGUMENT: MOTION TO STRIKE. Where the appellant files  
1 his argument and assumes the burden before any argument or notice is due from the appellee, the appellee's argument will not be stricken because not filed in time, or because appellee had given no notice that he intended to waive his opening argument.

**Same:** REVIEW OF INTERLOCUTORY ORDERS. On appeal from a final  
2 decree interlocutory orders properly excepted to will be reviewed.

**Private highway:** CONDEMNATION: PLEADINGS. A grantee of land  
3 not accessible to any highway, who alleges that his grantor owned land lying between the tract in question and a highway, and at one time a private way existed to the land sold, but that this right of way was not transferred; that there had been no road to the highway over grantor's intervening land because the same was rough and unsuitable for road purposes; and that no claim to a way of necessity over the same had ever been made, states a case under the statute providing for the condemnation of land for a road, even though he might have bought a way from another, or held an unenforceable contract with a third person for a right of way.

**Same: LOCATION OF ROAD: STATUTE.** The requirement of the statute 4 providing for the condemnation of land for a private way, that the same shall be on the division line or immediately adjacent thereto, should not be construed too narrowly, as the term "adjacent" has a broader meaning than the term "adjoining." And where the land immediately adjacent to the division line is so rough as to be impassable for road purposes, the way may be located so as to separate a small tract from the balance of the land through which it runs, since the petitioner must pay all damages to the entire tract as well as for the land taken.

*Appeal from Lee District Court.*—HON. HENRY BANK, JR., Judge.

THURSDAY, JUNE 16, 1910.

ACTION to enjoin defendant from proceeding under sections 2028, 2029, and 2030 of the Code to establish and lay out a road over plaintiff's land to reach a public highway. A temporary writ of injunction was granted, and defendant filed an answer and certain amendments thereto, to which plaintiffs filed a general equitable demurrer. This demurrer was sustained, and, defendant electing to stand thereon, the temporary injunction was made permanent. Defendant appeals. *Reversed and remanded.*

*R. N. Johnson and T. B. Snyder*, for appellant.

*John L. Benbow*, for appellees.

DEEMER, C. J.—I. Appellant has filed a motion to strike appellees' argument from the files, and to submit without argument from them. This is based upon the proposition that the argument was not filed in time under the rules and the further fact that appellees gave no notice of their intention to waive their opening argument. It appears,

1. APPEAL:  
argument:  
motion to  
strike.



however, that appellants filed their argument and assumed the burden before any argument or notice was due from appellee. Such being the facts, appellant's motion is without merit. Appellees have filed a motion to dismiss the appeal for the reason that it was not taken in time. There is no merit in this.

The rulings on the demurrer from which the appeal was taken were made April 9, 1909, and the appeal was taken August 6, 1909. The final decree was entered April 9, and exception taken, and the appeal is also from the final decree, and was taken in due season. On this latter appeal, all interlocutory, orders to which exceptions were taken may be reviewed. *Koboliska v. Swehla*, 107 Iowa, 124, and *Mueller Lumber Co. v. McCaffrey*, 141 Iowa, 730, sustain these conclusions. See, also, *Holladay v. Johnson*, 12 Iowa, 563; *Lesure Lumber Co. v. Insurance Co.*, 101 Iowa, 514.

II. Having disposed of these technical points of practice, we now come to the merits of the controversy. When this action was commenced, defendant was attempting to proceed under section 2028 *et seq.* of the Code to establish a way over plaintiffs' land. These sections so far as material read as follows:

Any person, . . . owning or leasing any land not having a public or private way thereto, may have a public way to any railway station, street or highway established over the land of another, not exceeding forty feet in width, to be located on a division line or immediately adjacent thereto, and not interfering with buildings, orchards, gardens or cemeteries; and when the same shall be constructed it shall, when passing through inclosed lands, be fenced on both sides by the person . . . causing it to be established. Code, section 2028.

If the owner of any real estate necessary to be taken refuses to grant the right of way, or if he and the person . . . asking its establishment can not agree upon the compensation to be paid therefor, the sheriff

of the county in which said real estate is situated shall, upon the application of either party, appoint six freeholders of the county, not interested in the same or a like question, who shall assess the damages which said owner will sustain, and make report thereof in writing to the sheriff, and, if the applicant for such way shall, before entering upon said real estate for the purpose of constructing such way, pay to the sheriff for the use of the owner the sum assessed, said road may be at once constructed and maintained. Code, section 2029.

The application to the sheriff, and all other proceedings relating thereto . . . and the rights and duties as to other roads, shall be the same as provided in this chapter in relation to the taking of private property for the right of way of railroads . . . and in the chapter or chapters of this code relating to roads, except that the report of the commissioner and the record thereof shall confer no title upon the applicant for the land so taken, but shall be presumptive evidence of the establishment of such way. Code, section 2030.

Section 2028 has been amended in some particulars by the acts of the Twenty-Ninth General Assembly (Acts 29th General Assembly, chapter 82), but, as these are not material, we do not set them forth. Plaintiffs alleged in their petition that they were the owners of certain land in Lee county, and that defendant Kramer had made application to the sheriff for the establishment of a private way or road over plaintiffs' land, alleging that he was the owner of adjoining tracts, and that he had no private way or road therefrom to any highway; and that the sheriff had selected commissioners who were about to enter upon plaintiffs' premises to establish a way or private road. Plaintiffs also alleged that defendant purchased his land from one Hinze and his wife, and that at the time he purchased Hinze and his wife were the owners of adjoining and adjacent lands which extended to and abutted upon a public highway, and they alleged that over these lands defendant had a private way to a public high-

way. They therefore asked an injunction against the establishment of a way over their premises. Attached to the petition was a copy of defendant's application to the sheriff, in which he asked for the establishment of a right of way over plaintiff's lands, alleging that he had no way or road, public or private, from his land to any highway. Defendant filed answer and a motion to dissolve the temporary writ of injunction issued upon the filing of the petition, and, in resistance to said motion, plaintiff Gus Miller filed an affidavit, in which he affirmed that defendant had a right of way over the land of Hinze to a public highway.

Defendant in his answer denied plaintiffs were the joint owners of the land as alleged by them, and denied the allegations of the petition to the effect that he was asking a private way or road, and denied the allegations with reference to the purchase of the lands from Hinze, and averred that he had a private way over their lands to a public highway. He averred, however, that he had filed an application to the sheriff under the statutes heretofore quoted, that the sheriff had appointed commissioners to assess the damages for the taking of the right of way, and that these commissioners were proceeding to act under their appointment. He denied that he was proceeding to establish this way as a private way, but averred that he was proceeding to establish it as a public right of way for the benefit of the public as well as himself. Defendant admitted the allegations of paragraph 5 of plaintiffs' petition, and this necessitates the setting out of that paragraph, which reads as follows:

(5) That Henry Kramer, the defendant, became the owner of the real estate described in his said application by a voluntary conveyance and warranty deed from Earnest Hinze and wife, dated March 16, 1905, recorded in Land Deed Record W on page 173 of the records of Lee county, at Ft. Madison, and by another conveyance under date

of June 3, 1905, from the said Earnest Hinze and wife to Henry Kramer, became the owner of the following adjacent and contiguous tract of real estate to that mentioned in his application, to wit: The east one-half (E.  $\frac{1}{2}$ ) of the northeast quarter (N. E.  $\frac{1}{4}$ ) of the southeast quarter (S. E.  $\frac{1}{4}$ ) of section 32, township 68, range 4 west, of Lee county, Iowa, which deed is recorded in Land Deed Record W on page 195 of the records of Lee county, Iowa, at Ft. Madison; that at the time of the said conveyance of the tracts hereinbefore mentioned by Earnest Hinze and wife to Henry Kramer the said Earnest Hinze was also the owner in fee simple of the adjacent and contiguous tracts of real estate to those conveyed to the said Kramer, to wit, fifty (50) acres in the west half (W.  $\frac{1}{2}$ ) of the southwest quarter (S. W.  $\frac{1}{4}$ ) of section 33, township 68, range 4 west, extending up to, intersected, and traversed by the public highway known as the Ft. Madison & West Point road, described in the application of said defendant, Kramer.

Defendant further alleged that this was an immaterial allegation, and further pleaded: "That the fifty acres belonging to Earnest Hinze extending to the public highway mentioned in said paragraph is very broken and cut up with deep ravines and hollows and impracticable for road purposes." He also alleged: "That plaintiffs verbally and orally agreed to and with the said defendant, Henry Kramer, to sell the piece of land owned by them over which this proposed right of way extends, and that said agreement between plaintiff Gus J. Miller and this defendant was reduced to writing a copy thereof being hereto attached marked 'Exhibit D' and made a part thereof, and that the said Gus J. Miller refuses to carry out said contract, and that the plaintiff Caroline Miller refuses to carry out and perform her oral contract because the same was for the sale of real estate, and not in writing, and defendant alleges by reason of these facts plaintiffs are estopped from maintaining this action, and that they have not come into equity with clean hands." He also denied

that he had a public or private road to the land owned by him as alleged in plaintiffs' petition (although this seems to be a conclusion of law rather than of fact). Attached to his answer was a contract signed by himself and Gus J. Miller for some land belonging to plaintiffs. Thereafter plaintiffs filed an amendment to their petition, in which they alleged "that the defendant has a right of way or private road by law granted and maintained over the land of Earnest Hinze, deceased, referred to in paragraph 5 of the original petition of plaintiffs; that a way or road has for more than ten years last past been maintained, traveled, and used over the said land in hauling with teams and wagons and other uses as is usually made of such country roads traversing such land over to the realty of the defendant, purchased from the said Earnest Hinze, as therein alleged."

They also alleged:

That the road as asked for in the application of defendant Kramer, is not upon the division line or immediately adjacent as provided by the statutes of the state of Iowa (sections 2028 and 2029), under which the proceedings are claimed by the defendant to have been instituted and maintained to establish the said road as a public way; but, on the contrary, the said road as asked for and as ordered leaves the said lines crossing and cutting the land of the plaintiffs in twain, leaving a considerable portion thereof on each side of said way, doing greater injury and damage to plaintiffs' land than a road along the quarter section line would do; that the said application shows that the defendant has a consent way or road over the land of Catherine Wiggenjost to the white oak tree, twenty inches in diameter, referred to in said application; that the land of Catherine Wiggenjost extends to the public highway in a direct line from the oak tree aforesaid, and is a shorter course than the distance asked over the land of the plaintiffs; that the land of Catherine Wiggenjost also extends to the public highway on the west of plaintiffs' land; that the application does not show that defendant, Kramer,

is unable to obtain a consent highway over the said land of Catherine Wiggenjost; that the defendant, Kramer, and these plaintiffs, are not adjoining landowners, hence have no division line in common; that the defendant, Kramer, petitioned the board of supervisors of Lee county, Iowa, within the last year representing that the quarter section line and immediately adjacent thereto from the said white oak tree east to the said public highway was a suitable, practical, and proper place for a public highway, and that one could be there constructed and maintained and asked that one be there established by said board.

Defendant denied each and every allegation in this amendment to the petition; but further pleaded as follows: "That the land of Catherine Wiggenjost from the oak tree referred to in the pleadings herein extends to the highway known as Ft. Madison & West Point Road, but alleges that said land is badly cut up by deep ravines and impassable and impracticable for road purposes, and that a load could not be hauled across the same; that the road or right of way sought by him in the application filed with the sheriff of Lee county does not leave the south division line of the property owned by plaintiffs at any point more than about three hundred feet, and that the land of plaintiffs immediately north of said division line and between the right of way in question is badly cut up by deep ravines, impassable, and impracticable for road purposes."

In an amendment to his answer he denied that he had a right of way over the land of Wiggenjost, and further alleged "that the land to which he is seeking an outlet to the public highway was purchased by him from Earnest Hinze, who at the time owned a tract of about fifty acres between said land and the public highway; that there was not then, never was, and is not now a road or driveway from the land purchased by defendant from said Hinze over and across the said land of the said Hinze to the highway; that the said Hinze, nor any

of his agents or employees, ever hauled any wood, produce, or anything else from the land owned by this defendant to the highway across the said Hinze fifty acres; that there never has existed any roadway or driveway or highway, or any means of getting with a team or wagon from the land bought by defendant from Hinze across the Hinze land to the highway; that the said Earnest Hinze is now dead, and said land is owned by his heirs."

The demurrer to these answers as amended was sustained, and defendant excepted. He thereupon filed an amendment to all his answers, in which he alleged: "That at the time he purchased the land to which he is now seeking an outlet to the public highway from Earnest Hinze, the said Earnest Hinze owned a fifty-acre tract of land between the land so purchased by this defendant and the highway; that said fifty-acre tract of land belonging to the said Earnest Hinze was then, and is now, impassable for road purposes, and never used by said Hinze or this defendant to reach the highway, and at the time defendant purchased said land from said Hinze the said Hinze had a right of way out to the highway from the piece of land purchased by this defendant over and across the land of others, which right has not been transferred to this defendant."

A motion was made to strike this amendment which was overruled, and plaintiff thereupon filed a general equitable demurrer to the answer as thus amended, and also stated as an additional ground of demurrer that the entire matter was adjudicated by the ruling on the first demurrer. This last demurrer was sustained and decree entered as prayed in the petition. On account of differences between counsel as to the state of the pleadings, it has seemed necessary to set them out verbatim at the seeming expense of time and paper. The trial court held that, under the allegations found in defendant's answers

as amended, he not only had an easement over the lands of his grantors to a public highway, but that he also had a way of necessity by implication of law, and was not entitled to proceed under section 2028 of the Code. This conclusion is seriously challenged by defendant's counsel, and they also claim defendant is entitled to have the road established as prayed for, although it is not on the division line.

There are but two questions presented by this appeal, and these are: (1) Has defendant, under the allegations of his answers, a public or private way to his land? (2) Is the proposed road on the division line or immediately adjacent thereto as provided by statute?

The statute seems to contemplate that such a road as was applied for may be established by one who does not have any public or private right of way to his land.

3. PRIVATE  
HIGHWAY:  
condemnation:  
pleadings.

This seems to negative the thought that the right to such a public or private way is the equivalent of such way. Now, defendant alleged that his grantor at one time had a private right of way to the land sold defendant, but it also averred, and this was admitted by the demurrer, that this right had not been transferred to defendant. Defendant also alleged that there never was and is not now a road or driveway to the highway, and that there never was any roadway or driveway or means of getting from the land to the highway. With reference to a right of way by necessity or by implication, the answer averred that his grantor's contiguous tract is broken, cut up by deep ravines and hollows, and was impracticable for road purposes, and was then impassable, and was never used by his grantor to reach the highway. From these allegations it would appear that defendant had no public or private way to his land, and that his right thereto, if he had one, was a barren and worthless one. We may assume that he was entitled to a right of way over his grantor's

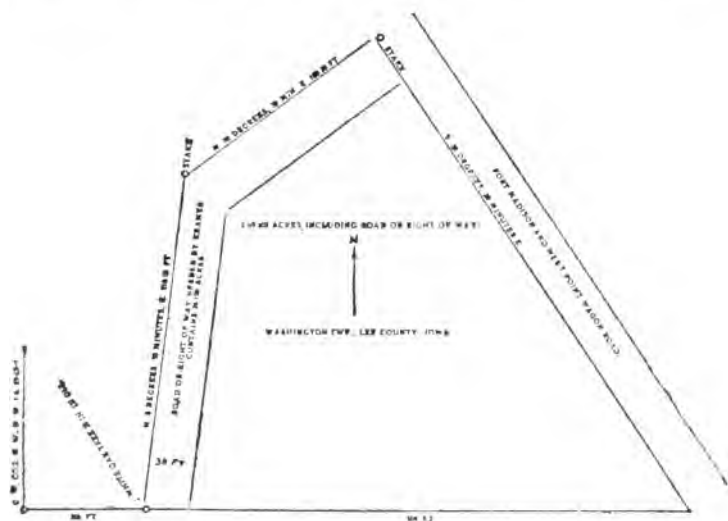


land by necessity; but this it seems was never claimed or asserted, and, according to the allegations of the answer, the character of his grantor's land was such as that the right was a useless one, for the reason that it was impractical to make a road thereover. It is alleged that defendant might have bought his way out from others; but this he was not required to do. Having no way either public or private he was entitled to procure one under the provisions of section 2028 of the Code before quoted. It is true that defendant alleges a contract with plaintiffs or one of them for a right of way; but for some reason he is not relying thereon, and, as plaintiffs claim nothing on account thereof, it is not necessary to refer to that matter further than to say that the description of the land to be conveyed is very uncertain and as it is for land rather than a right of way defendant can not enforce it against the plaintiffs.

The only remaining and difficult question in the case is: Is the way as proposed on the division line or immediately adjacent thereto? Defendant's allegation with reference thereto is as follows: "That the road or right of way sought by him . . . does not leave the south division line of the property owned by plaintiffs at any point more than about three hundred feet, and that the land of the plaintiffs immediately north of said division line is badly cut up by deep ravines and impassable and impracticable for road purposes." That the question may be better understood we attach a plat of the proposed road, which the parties concede to be approximately correct.

In construing the statute now before us, we held in *Morrison v. Thistle Coal Co.*, 119 Iowa, 705: "That it could not have been intended that the statute should be so interpreted as to make impracticable or inconvenient the connection of the railroad track authorized to be constructed on the right of way to a mine, and that, if the

4. SAME:  
location  
of road:  
statute.



proposed right of way follows a division line as nearly as practicable, the statute is substantially complied with. . . . Our conclusion, therefore, is that the statutory provisions above referred to have been substantially complied with, and that the injunction should be denied. It is proper to say that since this condemnation proceeding Code, section 2028, has been amended (Twenty-Ninth General Assembly, chapter 82) so as to eliminate the requirement that the right of way for the railroad furnishing an outlet for a mine shall be on a division line, or immediately adjacent thereto. Without holding that this is a legislative construction of Code, section 2028, we are content with the conclusion that prior to this amendment that section was to have a reasonable construction, and, as the question is not likely to again arise under that section, we do not think it necessary to further elaborate the reasons on which our conclusion is based." The word "adjacent" has a much broader meaning than "adjoining," and must have a reasonable construction. In view of the fact that defendant must pay all damages

due to the establishment of the road and fence the same on both sides, the fact that there will be a corner of plaintiffs' land consisting, according to the plat, of two and sixty-nine hundredths acres segregated from the remainder of the land, is not to be regarded as controlling in view of the allegations of the answer for defendant. He will have to pay the damages due to this segregation as well as damages to the whole tract. Defendant averred that his application was for a public road, and not a private one, and, as the application will bear this construction, plaintiffs are in no position to say that the road should not be established because it is a private one. Taking the allegations of the answers as a whole, we think they were not vulnerable to the demurrer, and that the case should have been tried upon the issues of fact presented thereby. Whether or not defendant is able to prove them upon trial we have no occasion now to consider.

For the reasons pointed out, the demurrer should have been overruled. The decree will therefore be reversed, and the cause remanded for trial according to the law announced in this opinion.

*Reversed and remanded.*

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J. W. MUDGE, Appellant, v. C. B. LIVERMORE, ET AL.

**Executions:** ISSUANCE AGAINST NONRESIDENT DEFENDANT. Lapse of  
1 time is not an impediment to the issuance of an execution on a  
judgment, where the judgment defendant left the state shortly  
after its rendition and had not since been a resident.

**Same:** PLACE OF ISSUANCE. Although a transcript of a judgment is  
2 filed in another county, execution thereon can only issue from  
the county in which the judgment was rendered.

**Judgments:** TRANSCRIPT: LIEN. The filing of a transcript of a judg-  
3 ment in another county thirty years after its rendition did not  
create a lien upon property therein.

**Same:** ENFORCEMENT. A judgment creditor is not entitled to the  
4 aid of equity in the enforcement of a judgment which is not  
a lien.

**Same:** LIENS: ENFORCEMENT. Although a judgment does not operate  
5 as a lien in the county where a transcript is filed, a lien may be  
obtained by the issuance and levy of an execution, and can be  
perfected by sale of the property.

**Same:** ENFORCEMENT IN EQUITY. Where a judgment defendant's in-  
6 terest in property out of which the judgment is sought to be en-  
forced is undisputed, the judgment creditor has a complete and  
adequate remedy at law and he can not therefore invoke the aid  
of a court of equity.

**Same:** REVIVOR: PERSONAL SERVICE. A dormant judgment can not be  
7 reestablished except by an order of revivor or a new judgment;  
and a revivor of the judgment by an action thereon can only be  
had upon personal service.

**Same:** ENFORCEMENT: APPEARANCE. Although a plaintiff may not be  
8 entitled to maintain a suit in equity to have a judgment declared  
a specific lien on property, still, where the defendant appears and  
demurs to the petition jurisdiction over his person is conferred,  
although there was no prior service of notice; and he may have  
the action transferred to the law docket for trial rather than  
dismissed.

*Appeal from Polk District Court.*—HON. W. H. Mc-  
HENRY, Judge.

MONDAY, NOVEMBER 22, 1909.

THE amended petition alleges that Emerson & Co.  
recovered judgment in the district court of Lucas county  
against defendant for \$128.70, with interest and costs,  
on March 21, 1876, and on September 24, 1907, assigned  
the same to the plaintiff; that shortly after the entry  
of said judgment defendant left the state, and has not  
since resided therein; that a transcript of said judgment  
had been filed in the office of the clerk of the district  
court of Polk county, but the clerk thereof had refused  
to issue execution thereon; that defendant was entitled

as an heir to an undivided one-third of certain real estate, but since the beginning of the action had attempted to dispose of the same for the purpose of preventing the collection of said indebtedness, and that, unless the said judgment be revived and made a specific lien on said real estate, plaintiff will be unable to collect the same, and therefore he is without adequate and speedy remedy at law. The prayer is that the judgment be revived and decreed a specific lien on defendant's interest in the real estate, and special execution issue for the sale thereof and general execution for any part remaining unsatisfied. To this a general equitable demurrer was interposed and sustained, and, as plaintiff elected to stand on the ruling, the petition was dismissed. From this ruling, plaintiff has appealed.—*Reversed.*

*George H. Lewis*, for appellant.

*Bowen, Bremner & Alberson*, for appellees.

LADD, J.—Section 3955 of the Code declares that “execution may issue at any time before a judgment is barred by the statute of limitations,” and section 3447 that “actions founded on a judgment of a court of record” may be brought within twenty years, but “the time during which a defendant is a nonresident of the state shall not be included in computing.” Section 3451, Code. The lapse of time, then, since the rendition of judgment in 1876, interposed no impediment to the issuance of execution, for defendant had been a nonresident of the state all the time. Nor had execution been refused by any officer having authority to issue it. The demand therefor was on the clerk of the district court of Polk county, with whom the transcript of the judgment entered in the district court of Lucas county had been filed. The filing of the transcript, if timely, may create a lien on

realty, but does not operate as a judgment, and execution only can issue out of the office of the clerk of the court which rendered the judgment. *Brunk v. Moulton Bank*, 121 Iowa, 14. But the filing of the transcript thirty years after the judgment was rendered, did not effect a lien. *Hanson v. Teabout*, 104 Iowa, 360; *Albee v. Curtis*, 77 Iowa, 644. So that the defendant's interest in the lots has never been subject to the lien of this judgment, and, though plaintiff may be entitled to have his judgment revived, he was not entitled to the aid of a court of equity in the enforcement of a lien that did not, and never had, existed. *Denegre v. Haun*, 13 Iowa, 240. See *Smith v. Hogg*, 52 Ohio St. 527 (40 N. E. 406). Even though no lien existed, however (section 3801, Code), one might have been effected by the issuance and levy of execution thereon, and this perfected by sale. *Stahl v. Roost*, 34 Iowa, 475.

As defendant's interest in the land was undisputed, there was then a complete and adequate remedy at law, and the power of a court of equity might not be invoked. *Kalona Savings Bank v. Eash*, 133 Iowa, 190. This result is not obviated by any change in the form of action essential to the revival of a judgment or the rendition of a new one, for, until the entry of the order of revivor or of judgment, the lien is not re-established. *Bertram v. Waterman*, 18 Iowa, 529; *Woodward v. Woodward*, 39 S. C. 259 (17 S. E. 638, 39 Am. St. Rep. 716); *Horbach v. Smiley*, 54 Neb. 217 (74 N. W. 623). See 23 Cyc. 1400, for collection of cases. Relief by way of revivor or in an action on a judgment can not be awarded save on personal service. See *Donaldson v. Dodd*, 79 Ga. 763 (4 S. E. 157); *Betts v. Johnson*, 68 Vt. 549 (35 Atl. 489). As there was no lien on the land and no personal service on the defendant, the court acquired no jurisdiction until the filing of the demurrer to the petition. Defendant thereby appeared, and, even

though no cause for equitable relief was stated in the petition, this was ground for transfer to the law side of the calendar, and not for the dismissal of the action. Section 3432 of the Code; *Thomas v. Farley*, 76 Iowa, 735; *Riddle v. Beattie*, 77 Iowa, 168. As this was but one of several points, and apparently of little consequence to appellant, each party will pay his own costs.—*Reversed*.

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LENA MONTAGNE MILEHAM, Apellee, v. JOHN F. MONTAGNE  
ET AL., Appellants.

**Will contest: MENTAL CAPACITY: SUBMISSION OF ISSUE: EVIDENCE.**

- 1 Where, as in this case, the defendants in a will contest failed to move for a directed verdict and asked the court to submit an interrogatory on the question of mental capacity of the testator, which was done, this amounted to a practical concession that the case was one for the jury. But aside from this fact the evidence was such as to clearly require a submission of the issue.

**Same: IMMATERIAL EVIDENCE.** Where a testator gave nothing to one  
2 of his daughters for the reason that her husband would spend it all, as stated in his will, evidence of the personal habits of the husband at the time of trial was immaterial.

**Same: CROSS-EXAMINATION: DOCUMENTARY EVIDENCE.** The cross-ex-  
3 amination of experts need not be confined in asking hypothetical questions to the facts disclosed by the testimony; and the court has a wide discretion in determining the range of inquiry. Thus, in this action to set aside a will on the ground of mental incapacity, documentary evidence consisting of notes and the records of actions against the testator; sheriff's deeds, garnishments, warrants of arrest for violation of injunction; the record of the commitment of testator to an insane hospital; and deeds made by him to his children after the execution of his will, were admissible as part of his history and as bearing upon his mental condition.

**Same: MENTAL CAPACITY: EVIDENCE.** It was claimed by contestants  
4 in this action that testator's mind had been affected by the murder of a relative several years prior to the execution of his will and it is held that evidence of the circumstances of the murder was admissible, on the promise of counsel to show that testator

knew the circumstances testified to, and that these matters had affected his mind.

**Same.** Evidence that the testator had been committed to a hospital  
5 for the insane, although several years prior to the making of his will; what took place between the testator and the witness while he was being taken to the hospital; and his subsequent discharge as sane; were competent on the question of his mental capacity at the time of the execution of his will.

**Same:** COMMITMENT AND DISCHARGE FROM HOSPITAL FOR INSANE: EVIDENCE: INSTRUCTIONS. The discharge as sane of one committed  
6 to a hospital for the insane is *prima facie* evidence of his sanity, although not conclusive, and casts the burden upon one attacking his will subsequently made to show that he was insane at the time of the execution of the will; and such commitment and discharge are competent evidence for the consideration of the jury in determining his mental condition when the will was executed.

**Wills:** EVIDENCE: INEQUITABLE PROVISIONS: INSTRUCTIONS. Inequality  
7 and inequity in the provisions of a will will not alone warrant the presumption of mental incapacity, but they may and should be considered as circumstances in connection with other facts bearing on the condition of the testator's mind at the time of executing the will, in determining his mental capacity.

**Same:** MENTAL CAPACITY: EVIDENCE: INSTRUCTION. Evidence of the  
8 fact that a testator transacted his own business and seemed to be mentally competent to those with whom he came in contact, while competent on the question of capacity, will not conclusively establish his sanity; as a state of mental unsoundness may still exist which would render him incompetent to make a will; and impairment of the mental faculties which destroys testamentary capacity disqualifies one from making a will, even though it has not reached the state of absolute imbecility.

*Appeal from Cherokee District Court.*—HON F. R. GAYNOR, Judge.

TUESDAY, APRIL 5, 1910.

**ACTION** to set aside the probate of the last will and testament of John G. Montagne and to set aside the will because of mental incapacity and undue influence. The



case was tried to a jury, resulting in a verdict and judgment setting aside the will because of the mental incapacity of the testator. *Affirmed.*

*William Mulvaney*, for appellants.

*J. A. Miller and Herrick & Herrick*, for appellee.

DEEMER, C. J.—Appellants assign forty-six errors, and it is manifest that it would be impossible in the course of an ordinary opinion to consider each and every assignment; nor is it necessary to do so, for many of them are not argued, and those argued may well be grouped into a few classes or divisions for the purpose of an opinion. The chief contentions made for appellants are that the verdict has no support in the testimony; that the court erred in its rulings on evidence; erred in its instructions given to the jury; and in refusing certain of those asked by proponents.

I. Testator was a German by birth, and, as near as can be told, was sixty-eight years old at the time of his death. He died June 12, 1907, leaving his wife and six children surviving. His heirs were all of age at the time of his death. The will was executed on June 2, 1907, while testator was ill, and was admitted to probate without appearance or contest. This action was commenced June 9, 1908, to set aside the probate of the will and the will itself because of testator's mental incapacity and for the alleged undue influence of certain of the devisees and legatees under the will. The latter issue was not submitted to the jury and need not be considered, save as it may bear upon certain rulings of the court made during the trial.

The will gave his widow a life estate in all his property in lieu of dower, provided she remained unmarried, and of the remainder he gave plaintiff the sum of

\$10, provided for the support of a daughter Annie during her life, appointed a testamentary guardian for her, and gave all the residue of his estate to his three sons and the one daughter not already mentioned by name. In June of the year 1900, testator was adjudged insane and committed to the hospital at Clarinda, from which he was discharged in October of the same year. In August of the year 1893, testator's sister and her husband, who had lived on one of testator's farms near Cherokee, were murdered, and this made a very profound impression on his mind. At one time he laid this murder at the door of his brother, John C. Montagne. This murder prayed upon his mind down to the time of his death and profoundly influenced all his mental processes. He had a sister who was insane, and one of his daughters is mentally incompetent. A great deal of testimony was taken tending to show that testator labored under delusions and hallucinations which were the product of a diseased mind, and testimony both expert and nonexpert was taken upon the condition of his mind.

Defendants did not move for a directed verdict, but, on the contrary, in effect asked the court to submit the matter of mental incapacity to the jury, and had a special interrogatory submitted to the jury upon this proposition. This was a practical concession that the case was one for a jury.

I. WILL CONTEST:  
mental capac-  
ity: submission  
of issue:  
evidence.

*In re Betts*, 113 Iowa, 114. Aside from this, however, we think the case upon this issue was clearly one for a jury. It is not our custom to set out the testimony upon which we base our conclusions, and no useful purpose would be served in departing from the rule in this particular case. Suffice it to say that there is nothing in defendants' first proposition.

II. Something like thirteen rulings on the admission and rejection of testimony are challenged; but we shall only notice those which are deemed important or con-

trolling. Several of the propositions involved have already been decided by this court, and these need not be noticed.

Defendants offered to show the personal habits of plaintiff's husband at the time of trial. This in itself was immaterial to any inquiry in the case. The witness

had already testified that testator said he did not leave anything by will to plaintiff for the reason that if he did so her husband would spend it all, and that his wife and his boys would take care of her in any event. The inquiry as to the habits of the husband at the time of trial was not important. One other question put to this witness involved a conclusion as to testator's state of mind at the time he made the will, and this was manifestly incompetent.

Complaint is made of the cross-examination of one of the experts used by defendants. It is said that too great latitude was given, and that hypothetical questions

were propounded on this cross-examination which had no foundation in the testimony.

It is a general rule that upon the cross-examination of experts counsel are not confined, in putting hypothetical questions, to the facts disclosed by the testimony, and it is also a general rule that a wide discretion is lodged in the trial court in the range of inquiry to be made on cross-examination. Plaintiff was permitted, over defendants' objections, to offer a large amount of documentary evidence. These were notes and records of actions and proceedings in various courts against the testator, sheriff's deeds, garnishments, warrants of arrest for violation of injunction, etc., covering quite a period of time, but all showing testator's conduct and business transactions for a period of time material to the issue in the case. We discover none which were improperly admitted; in fact, they all bore more or less upon testator's conduct and were a part of his personal history. They were

admissible as such. Among other things was the record of commitment to the insane hospital, and also deeds made by testator to various ones of his children after the will was made. These were surely admissible. Counsel for appellant does not point out any specific document which he thinks was inadmissible, and we shall not look through the great number complained of *en masse* to see if any special one was inadmissible.

Plaintiff was permitted to prove, over defendant's objections, the circumstances of the Schultz murder, which is the one already referred to, and some of the details connected therewith. This was done after plaintiff's promise to show that testator knew of all the things disclosed by the witness, and that these matters had an effect upon testator's mind. In this there was no error. If plaintiff did not come forward with the promised proof, defendants' remedy was to move to strike. This was not done, manifestly for the reason that plaintiff made the promise good. In any event, however, defendants may not complain of the rulings. Plaintiff was permitted to prove the effect of the Schultz murder upon testator's mind. This was clearly competent, although the murder occurred something like thirteen or fourteen years before the will was drawn. If the witnesses are to be believed, this murder was a great mental shock upon testator's mind, and was the producing cause of his mental disorders. It was competent, then, to prove that fact.

Another witness was permitted to prove what took place between himself and the testator while he was taking him (testator) to the insane hospital. Although this was something like seven years before the making of the will, the testimony was proper and competent. It tended to show testator's mental unsoundness at that time, and his condition at that time was material, even though it appears that he was subse-

4. SAME:  
mental  
capacity:  
evidence.

5. SAME.

quently discharged from the hospital under the belief that he was restored to sanity. *State v. Felter*, 25 Iowa, 68. Insanity, once established, is presumed to continue until the contrary is shown. *In re Knox's Will*, 123 Iowa, 24. Of course, discharge from the hospital is evidence of a change in mental condition; but it is not conclusive. The finding of lunacy and the commitment to the hospital were admissible in evidence, as also was the discharge; neither, however, being conclusive. We discover no prejudicial error in the rulings on evidence.

III. The complaints regarding the instructions largely revolve around the central thought advanced by defendants' counsel to the effect, that, if testator was unsound of mind, his insanity was not chronic, but partial. The testimony offered by contestant tended to show chronic or general insanity, and not partial with lucid intervals; but, even were this not so, the trial court instructed that the burden was upon contestant to show testator's mental unsoundness at the very time the will was executed.

Going now to the specific instructions complained of, we shall notice but a few of them. Others which are complained of have been distinctly approved by this court many times and need not be noticed. Paragraph 5 of the instructions reads as follows:

It appears that some time in the month of June, 1900, the said John George Montagne was adjudged insane by the commissioners of insanity of this county; that he was taken to the state hospital for insane at Clarinda, Iowa, for treatment; that he was subsequently discharged from said hospital. You are instructed that this is *prima facie* evidence, but not conclusive, that he had recovered from the condition which caused his incarceration in the hospital, for while it is true that all people are presumed to be sane, yet when it is shown at any time that a contrary condition exists, and that he is in fact insane, this condition is presumed to continue until the

6. SAME: commitment and discharge from hospital for insane: evidence: instructions.

contrary appears, and, where one is discharged by the proper authorities after being adjudged insane, the presumption is that he has resumed his natural and normal state of mind, and the burden would rest upon the party alleging insanity at a later period to establish by a preponderance of the evidence the existence of such insanity; but, however, it is proper for you to consider, with all the other evidence in the case, the fact that the party was at one time insane in determining whether or not insanity existed at a later time and at the time of the execution of the instrument purporting to be his last will.

As opposed to this, defendants asked the following:

Par. 3. Evidence has been introduced showing that the testator, John George Montagne, was adjudged insane, by the commissioners of insanity of Cherokee county, Iowa, in the month of June, A. D. 1900, and that he was thereafter taken to the state hospital for the insane at Clarinda, Iowa, for treatment, and the undisputed evidence further shows that the testator was discharged from the state hospital as cured. You are therefore instructed that no presumption of insanity at the time of the making of the will in question could be predicated or indulged in upon this adjudication, for, while insanity, when once proven, is presumed to continue until the contrary is shown, the fact that the testator was discharged cured rebuts the presumption of insanity, and the said testator is forever afterwards presumed to be sane until the contrary appears. Therefore you are instructed that the fact that the said John George Montagne was adjudged insane in the year 1900 will not now relieve the plaintiff of proving his insanity at the time of the execution of the will in question.

The difference between the one given and the one asked is this: That in the one given the jury is authorized to consider the adjudication of insanity in arriving at its conclusion regarding testator's condition of mind when the will was executed, while in the one asked this determination is eliminated. The instruction given seems to us to be correct. The fact of insanity at one time being

established, such fact may be considered in determining the condition of the person's mind at a subsequent period, although such person may have been discharged from the place of detention as cured. It is well known that mental diseases are subject to recurrence, and it is perfectly proper to show that one is predisposed to insanity, whenever the condition of his mind may become the subject of judicial inquiry. *Dicken v. Johnson*, 7 Ga. 484; *Terry v. Buffington*, 11 Ga. 337 (56 Am. Dec. 425); *Rodgers v. Rodgers*, 56 Kan. 483 (43 Pac. 779); *In re Knox*, 123 Iowa, 24. The weight of such prior finding of insanity is for the jury, depending upon the nature of the disease, whether temporary or chronic, the result of an injury from which complete recovery may be expected, or the offspring of congenital defects, or of such a nature that its recurrence might reasonably be expected. The court instructed that testator's discharge was *prima facie* evidence of recovery, and cast the burden upon plaintiff of showing that, notwithstanding his discharge, testator was insane when the will was executed. This states the law as we understand it. See Code, section 2288, which expressly provides that a discharge from the hospital shall be *prima facie* evidence of recovery.

Instruction No. 7 reads:

You are instructed that in determining the question of whether the testator, John George Montagne, was, at the time of the making of the instrument in question, a man of sound mind, and had sufficient mental capacity to make a valid will, you may take into consideration the terms and provisions of the will itself, whether the same are just or unjust, reasonable or unreasonable, natural or unnatural, and you may take into consideration the evidence as disclosed to you upon the trial relating to the financial condition of the plaintiff, daughter of said testator, and the financial condition of the other devisees under said will at the time of the execution of said instru-

7. WILLS:  
evidence:  
inequitable  
provisions:  
instructions.

ment, and also the extent of the estate of the testator as the same existed at the time of the execution of said instrument; but the apparent inequality or inequity in the provisions of the will will not alone warrant the presumption of mental incapacity, but they may and should be considered as circumstances in connection with other facts bearing on the condition of the testator's mind at the time of executing the will.

This instruction is vigorously assailed. It appears to be in accord with our own cases and is sustained by numerous precedents from other jurisdictions. *Manatt v. Scott*, 106 Iowa, 216; *In re Wharton*, 132 Iowa, 723; *Hardenburgh v. Hardenburgh*, 133 Iowa, 6; *Stutsman v. Sharpless*, 125 Iowa, 341; *Smith v. Ryan*, 136 Iowa, 339; *Wallen v. Wallen*, 107 Va. 131 (57 S. E. 596); *Graham v. Deuterman*, 206 Ill. 378 (69 N. E. 237); *Knox v. Knox*, 95 Ala. 495 (11 South. 125, 36 Am. St. Rep. 235); *Peck v. Carey*, 27 N. Y. 9 (84 Am. Dec. 226); *Rasdall v. Brush*, 31 Ky. Law Rep. 1138 (104 S. W. 749); *Sim v. Russell*, 90 Iowa, 656. It will be observed that the instruction specifically says that inequalities in the will will not alone warrant the presumption of mental incapacity. This qualification makes the instruction invulnerable to attack.

Instruction No. 8 given by the court reads as follows:

You are instructed that the fact, if shown, that the testator transacted his own business, and to all outward appearances seemed to be of sane and sound mind to those with whom he came in contact in a business or social way, while competent to be considered on the question of sanity, does not of itself conclusively establish sanity, and you are instructed that a state of mental unsoundness may exist in such person which would render him incompetent to make a will, notwithstanding his apparent sanity to those with whom he comes in contact and who

8. SAME: mental capacity: evidence: instruction.



are not experts on the subject of insanity; and in determining whether or not the testator in this case had testamentary capacity, or was wanting in testamentary capacity at the time of the execution of the instrument, Exhibit A, you should take into consideration and carefully weigh all the evidence introduced and submitted to you bearing on this subject, and therefrom, aided by the instructions herein given you, determine and say in your verdict what the very truth of the matter is. You are instructed that any impairment of the mental faculties which destroys testamentary capacity, as hereinbefore defined, disqualifies a person from making a will, even though it has not reached the state of absolute imbecility.

This instruction is also challenged. We think it is correct. In Underhill on Wills p. 134, the learned author says: "But a person who is permanently insane may, to all outward appearances, act and talk in the most rational manner, and yet there be no real abatement of his malady. He may be just as unsound in his calmer mood as in his fits of raving." Judge Cooley, in *People v. Garbutt*, 17 Mich. 16 (97 Am. Dec. 162), in writing the opinion of the court, thus expressed himself regarding this matter: "Those questions which relate to the discovery and proof of insanity in criminal cases are perhaps the most difficult of any with which courts and juries are compelled to deal. Mental disease is itself so various in character, so vague, sometimes, in its manifestations, and so deceptive, especially in its early stages, and its causes are so subtle and so difficult to trace, that the most experienced experts are sometimes obliged to confess that, however careful and thorough their investigations, they still prove unsatisfactory, leaving the mind not only in a condition of painful uncertainty upon the principal question whether mental disease actually exists, but when its actual presence is demonstrated, failing utterly, in many cases, to trace it to any sufficient cause." These quotations lucidly state a rule which is well known, not only to all alienists, but

to observing laymen as well. It was perfectly legitimate to state the rule to the jury in this case.

Other instructions are challenged, but they seem to be in accord with our previous decisions and need not be further noticed. Defendants asked ten instructions, none of which were given in the exact terms in which they were written. In so far as they are correct, they were embodied in the charge as given.

Counsel rely largely upon *Kirsher v. Kirsher*, 120 Iowa, 337, and *Glass v. Glass*, 127 Iowa, 646, in support of the appeal. These cases do not run counter to any views herein expressed, or to any of the rules given by the trial court in its charge. The burden was not cast upon defendants to show that testator had recovered his sanity. On the contrary, the trial court clearly put this burden upon the plaintiff.

The record is singularly free from error, and no good ground is shown for a reversal.

The judgment therefore must be, and it is, *affirmed*.

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STATE OF IOWA, Plaintiff, v. THE BOARD OF DIRECTORS,  
etc., Defendant.

**Schools: FORMATION OF CONSOLIDATED DISTRICTS: TERRITORIAL LIMITS.**

- 1 The territory of a consolidated independent school district organized under the provisions of Code Supplement, Section 2794a, can not be reduced to less than sixteen government sections, by taking territory therefrom for the organization of a new consolidated independent district.

**Appeal: AFFIRMANCE OF JUDGMENT BY OPERATION OF LAW.** Upon the 2 equal division of the appellate court a judgment of the lower court is affirmed by operation of law.

*Appeal from Clay District Court.*—HON. D. F. COYLE,  
Judge.

TUESDAY, SEPTEMBER 27, 1910.

THE facts are stated in the opinion. *Affirmed.*

*Geo. A. Heald*, for appellant.

*F. F. Faville*, for appellee.

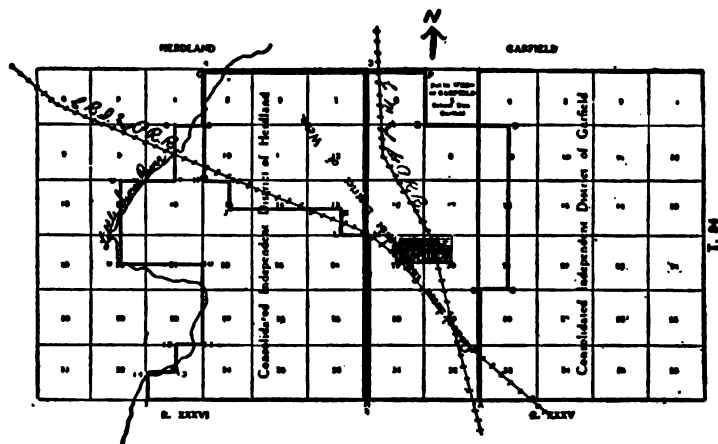
EVANS, J.—In form this is an action of mandamus to compel the certification of taxes by the officers of three independent school districts which are named as defendants. There were answers and cross-bills. The real controversy in the case is between the defendants themselves. Such controversy involves the conflicting claims of the independent school districts over disputed territory, and incidentally involves the legality of the existence of two of the districts. The districts originally involved were the consolidated independent school district of Webb, the consolidated independent school district of Herdland, and the consolidated independent school district of Garfield. The case as presented involves the construction of section 2794a, Code Supp., which is as follows:

Sec. 2794a. Consolidation—how effected: When a written description describing the boundaries of contiguous territory containing not less than sixteen government sections within one or more counties is signed by one-third of the electors residing on such territory and approved by the county superintendent, if one county, and by the superintendents of each if more than one county, and by the state superintendent if the county superintendents do not agree, and filed with the board of the school corporation in which the portion of the proposed district having the largest number of voters is situated, requesting the establishment of a consolidated independent district, it shall be the duty of said board within ten days to call an election in the proposed consolidated independent district for which they shall give the same notices as are required in section 2746 of the Code and 2750 of the Supplement to the

Code, at which meeting all voters residing in the proposed independent district shall be allowed to vote by ballot for or against such separate organization. If a majority of votes cast at such election shall be in favor of such independent organization, the organization of the proposed corporation shall be completed by the election of a board of electors as provided in section 2795 of the Code, said board to organize on the first day of July following unless that day falls on a Sunday, in which case on the day following. All taxes previously certified shall be void so far as the property within the limits of the consolidated independent district is concerned, and all taxes necessary for the new corporation shall be certified and levied as provided in section 2796 of the Code, but no school corporation from which territory is taken shall, after the change, contain less than four government sections, which territory shall be contiguous and so situated as to form a suitable corporation.' When it is proposed to include in such district a town, city, or village, the voters residing upon the territory outside of the town, city or village shall be entitled to vote separately upon the proposition for the formation of such new district by presenting a petition of at least twenty-five percent of the voters residing upon such outside territory, and if a majority of the votes so cast is against including such outside territory, then the proposed independent district shall not be formed.

In 1908 proceedings were had in pursuance of the section quoted to organize the consolidated independent district of Herdland. And all the provisions of such section were literally complied with. Such district so formed included seven and one-half sections of the territory of the pre-existing district of Webb, and reduced the territory of the district of Webb to twelve and one-half sections. There was a purported organization of the district of Garfield, which took a section and a half from the pre-existing district of Webb, and further reduced its territory to eleven sections. On the trial below, however, it appears to have been conceded that the district

of Garfield was illegally organized, and that its proceedings were ineffective. It suffered judgment to go against it below, and it has not appealed. We have only to consider, therefore, the conflicting claims of the districts of Herdland and Webb. The following plat shows the claimed boundaries:



The territory in dispute consists of sections 1, 2, 3, 10, 11, 12, and a part of sections 13, 14, 15 in the civil township of Herdland. As already stated, the proceedings purporting to organize the independent district of Herdland were had in strict accord with section 2794a, Code Supp., and were in all respects legal unless such proposed district was precluded from including within its proposed boundaries seven and one-half sections of the territory of the pre-existing district of Webb. The issues were so framed as to present for the consideration of the court this one question alone. That an independent district organized under this section may include a part of the territory of pre-existing independent districts is conceded. But it is contended on behalf of the district of Webb that the territory in question could not be taken away from it because it was itself organized

in the year 1907 under this same section of the statute, and that the effect of the taking of this territory would be to leave to the district of Webb less than sixteen sections, and that the statute in effect guarantees to it a continuing territory of not less than sixteen sections. It appears from the evidence that, after its organization in 1907, the district of Webb incurred expense in the building of a schoolhouse and otherwise, and levied taxes therefor, and that it has a school population of one hundred and thirty-five children. The question presented, however, is one wholly of statutory construction, and we can not be much aided therein by evidence along the lines indicated.

The controversy presents no middle ground. We must dispose of it with a "yea" or a "nay." There is much to be said for and against both sides of the controversy, and an unqualified finding in favor of either is unsatisfactory. The statute has manifest need of amendment at this point. It was the view of the trial court that the district of Webb was entitled to maintain its territory, and that the district of Herdland was therefore illegally organized, and decree was entered accordingly. The argument in support of this view is that the section in question was enacted for the purpose of enabling the organization of a larger independent district in rural communities. Such larger unit is referred to in the statute as a "consolidated independent district." It is argued that such proposed consolidated independent district could appropriate the territory of other independent districts down to a minimum limit of four sections, but that, when such consolidated independent district is itself formed, its own territory can not be thus appropriated beyond a minimum of sixteen sections. If this be not so, it is manifest that such a district once organized will at all times be subject to disintegration down to four sections by the inclusion of its territory in new districts subse-

quently formed. This is the strong point in the argument. Concededly it is desirable that when an independent district is once organized and incurs expense, and levies taxes in pursuance of the purpose of its organization, there be as much stability in such organization in its territory and boundaries as is consistent with the public interest.

Prior to the enactment of the section in question, the existing statute already provided for various forms of school district organization. There was (1) the sub-district and school township plan; (2) the rural independent district; (3) the town and city independent district. The enactment of section 2794a added a fourth plan. It did not dispense with the others. No previous section was repealed. The new statute was enacted as an additional method. All these statutory methods are provided subject to the choice of local authorities and electors. In construing, therefore, the implications of the new section, we can not ignore the other sections of the statute on the same general subject. By an examination of the various sections of this chapter of the Code, it will be observed that great liberality has been provided, not only for the organization of school districts by different plans, but for the change of such plan of organization, and for the change of boundaries and territory from time to time as the wisdom of the hour might demand. For instance, section 2791 provides for the separation of territory from one corporation and attaching it to another under certain circumstances. Section 2792 provides for a restoration of territory previously detached. Section 2793 provides for the change of boundary lines of contiguous independent districts. Section 2797 provides for changing a school township organization into a rural independent district organization. Section 2798 provides for the dividing of independent districts into two or more. Section 2799 provides for uniting independent districts. Section 2800

provides for uniting rural independent districts into a school township. And the section under consideration (2794a) clearly contemplates that the territory of preexisting school corporations may be included within the proposed boundaries subject only to the limitation that such pre-existing school corporation shall not be reduced in its territory below four sections.

The question then is: Does this proviso apply to the school corporations which are organized under this section? To put it in another way, is the independent district of Webb subject to the proviso of the section under which it was incorporated? Can we say that a district organization under this section has an open door to appropriate territory from all other districts, but that, when it is once organized, the door is closed against the appropriation of any of its territory or the change of its boundaries? We think it must be said that, unless its territory may be taken subject to this proviso, then there is no provision for changing boundaries of this kind of a district at all. Counsel for appellee concedes in his argument that its territory may be taken down to a minimum limit of sixteen sections; but this concession is gratuitous. There is no basis for it in the statute. As a part of the argument, it serves to cover the weak spot in appellee's case. It is one of the conditions of the initiative in proceedings for the establishment of a district of this plan that the petition therefor shall describe not less than sixteen sections. Undoubtedly the proposed district must contain sixteen sections or more in its original organization. Whether after its organization it shall be subject to future revision depends upon the applicability of that proviso of this section that "no school corporation from which territory is taken shall after the change contain less than four government sections." If this proviso is applicable to an organization under this section, then the territory of such district may be reduced to four sections by complying with the methods pointed out in this section



of the statute. If this proviso is not applicable, then there is no provision whereby any change can be made in the boundaries of such district after its organization. We are confronted, therefore, with the alternative either to hold that the boundaries of such a district are unalterable, or else that the territory of such a district is subject to appropriation by a new district upon the same conditions as apply to any other district and to a minimum limit of four sections.

If we should hold that the boundaries of an independent district organized under this section are irrevocably fixed by its act of organization, then the territory of the various townships might be taken up in a very irregular way by successive corporations organized under this section, leaving small districts here and there organized under previous sections and reduced to four sections by the appropriation of their territory. Necessarily the boundaries of such small districts would become unchangeable also because they could not be changed without changing the boundaries of the larger districts. A district once formed might prove wholly impracticable, and it might well be deemed advisable to reduce its territory and to lay other boundaries, and to organize other districts to meet the then needs of the locality. It is urged with much force that fair construction of this section of the statute requires us to hold that the boundaries of a district organized thereunder are not unalterable, but that they may be changed by the method and subject to the limitation therein provided. Under this section, a petition which proposes to appropriate the territory of any other district must have the approval of the county superintendent as a condition precedent. It is argued that this is not a great safeguard, and that a county superintendent may act with little deliberation or judgment. It is also argued that the county superintendent in the present instance did so act without deliberation

or judgment. We are impressed with the suggestion and can well believe that additional safeguards ought to be provided, and that it were better if the statute provided for notice to interested parties and a hearing before the superintendent, and perhaps a majority vote of the electors of the territory proposed to be segregated. But these suggestions all go to the improvement of the statute, and are for legislative consideration only. It is said that the voters who favored the organization of a larger district might not have voted in favor of the organization of a smaller district of four sections, and that the effect of reducing their territory to four sections is to force upon them a corporation which they would not have organized at all. This same argument would forbid the reduction of the territory of any district, either to the basis of sixteen sections or four sections. The district of Webb consisted of twenty sections. A majority of the voters in twenty sections voted in favor of its organization. It does not follow that the majority of voters in any sixteen sections voted for such organization, or that they would have voted in favor of a sixteen section corporation. In *School District v. Kelley*, 120 Iowa, 119, it was held that an independent district organized under section 2794 and including a village could appropriate the territory of a pre-existing independent district even to the extent of reducing such district to less than four sections.

As presenting the other view, it is to be considered that the statute in question was enacted to meet the demand for authority to consolidate small county districts into a single large one. This manifest purpose naturally calls for such reasonable construction of the statute as will effectuate it. This gives much force to the argument that the provisions of the statute which permit the change of boundaries so as to reduce the area of an organized district to a minimum of four sections is applicable only

to the other forms or kinds of district, and is not intended to permit encroachment to such extent upon a consolidated district duly created. The members of this court are equally divided in opinion as to which view should prevail. This divided opinion must result in an affirmance of the order of the lower court by operation of law. In such a case we usually announce the result without opinion. We depart from the custom in this case in order that the difficulties presented by the statute in its present form may be brought more readily to the attention of the Legislature. We are united in the opinion that neither construction contended for is satisfactory, and that either presents grave difficulties, and that the statute ought to have the further consideration of the Legislature.

The order of the trial court will therefore be affirmed by operation of law.—*Affirmed.*

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E. A. CANTONWINE, Appellant, v. BOSCH BROTHERS and others, Appellees.

**Compromise and settlement:** REPUDIATION. One against whom a  
1 claim is made may buy his peace at any price he sees fit to pay,  
and the mere fact that he subsequently concludes that he acted  
rashly or even foolishly will not authorize him to repudiate the  
settlement, even though the claim made against him was without  
foundation.

**Duress:** SUFFICIENCY OF SHOWING. To recover money as having  
2 been paid under duress it must appear that the plaintiff's will  
was overpowered by threats; mere reluctance to pay is not enough.

**Appeal:** AMENDMENT OF RECORD. Where the record on appeal shows  
3 an appealable judgment an amendment of the record to show  
that the judgment was not entered on the journal until after the  
appeal was taken will not affect the appeal.

*Appeal from Marshall District Court.*—HON. C. B. BRAD-  
SHAW, Judge.

TUESDAY, SEPTEMBER 27, 1910.

ACTION in equity to set aside an agreement transferring certain property and funds to the defendants and for a money judgment. The petition was dismissed, and plaintiff appeals.—*Affirmed*.

*Boardman & Lawrence* and *Burnham & Eggermayer*,  
for appellant.

*J. L. Carney* and *F. L. Meeker*, for appellees.

WEAVER, J.—During the period covered by the transactions in controversy, the defendants were the proprietors of a general country store at the village of Van Cleve in Marshall county, and the plaintiff was a young physician who made the store his headquarters and when not attending professional calls assisted in and about the business. He entered upon his practice in Van Cleve in the year 1902, at which time the store was owned and managed by one Millhouse, and until his marriage in 1903 was given his board for the assistance he rendered the proprietors. In December, 1904, the defendants purchased and took charge of the business; the plaintiff continuing to render similar service when not engaged in his practice. He received no compensation other than his cigars and the privilege of purchasing goods and household supplies at cost. Prior to April 3, 1907, the plaintiff, who claims to have enjoyed a profitable practice and to have made profit upon investments, had lent defendants various sums of money, and on the date mentioned their indebtedness to him was about \$2,800. On that day they charged him with appropriating and converting to his own use moneys aggregating a large sum from the funds belonging to them and demanded settlement and payment at once. The substance of the demand

made by them upon the plaintiff was that he should cancel their debt to him and pay them the further sum of \$5,000. After some negotiation the plaintiff surrendered to defendants their notes to the amount of \$2,800 and certificates of desposit held by him amounting to the further sum of \$3,365.74. To set aside these transfers, or, in lieu thereof, to recover the value of said securities, this action was instituted. The relief thus demanded is on the alleged ground that plaintiff's compliance with defendants' demands and the delivery of said papers were exacted from him under duress and by undue influence and coercion and made in pursuance of an unlawful agreement for the compounding of a charge of felony. The defendants deny that they exercised any duress over the plaintiff or coerced him to said agreement. They admit having received from plaintiff the securities mentioned to the amount of \$6,165.74, but aver that said sum was paid them upon settlement of their claim, which settlement was voluntarily made and agreed to by plaintiff, who thereafter and during the same day reaffirmed it by delivering over the said notes and certificates. On trial to the court a decree was entered in defendants' favor dismissing the bill, and plaintiff appeals.

As will be seen from the foregoing statement, the question at issue is essentially one of fact. The trial was a protracted one, and a large mass of testimony was introduced, most of which bears more or less directly upon the manner in which the business at defendants' store was carried on, the character and extent of plaintiff's connection therewith, and the circumstances relied upon by defendants to justify their claim and belief that plaintiff had for a long time been appropriating moneys belonging to them. We shall not undertake any review of this evidence. While much of it is to our minds of a very weak and inconclusive character, there is some which, if true, tends

1. COMPROMISE  
AND  
SETTLEMENT:  
repudiation.

quite clearly to sustain the accusation preferred by the defendants. To say the least, it makes a case from which it is impossible for this court to find that the charge was made in bad faith or for the mere purpose of extortion. That defendants believed they had been robbed by the plaintiff we think is evident, and we have little doubt they in good faith believed they had a valid claim against him for damages. Such being the case, then, if they asserted such claim, and plaintiff yielded to their demand and voluntarily delivered to them the securities in compromise or settlement thereof, the law will not permit him to repudiate the settlement and recover his property, even though he is able to show conclusively that the charge made against him was without foundation. In other words, a man against whom a claim is made may buy his peace at any price he sees fit to pay for it, and the mere fact that on second thought or taking advice of others he becomes convinced that he has acted rashly or even foolishly the law affords him no remedy. *Richardson v. Hampton*, 70 Iowa, 576; *Dunham v. Griswold*, 100 N. Y. 227 (3 N. E. 76); *Stewart v. Ahrenfeldt*, 4 Denio (N. Y.) 189.

Starting, then, with the assumption that the claim of the defendants was asserted in good faith (and we must assume that it was so made in the absence of evidence to the contrary), the one question remaining is whether they obtained the settlement by coercion or undue influence or as part of an agreement to suppress a prosecution for felony. The only direct evidence in support of this claim is that given by plaintiff himself corroborated in part by that of his wife. On the other hand are the equally positive denials of the defendants. Their version also finds some circumstantial support in the plaintiff's own story that, the accusation and demand being first made, he, after only a brief parley, asked the defendants how

2. DUNHAM:  
sufficiency  
of showing.

much they wanted and began to negotiate as to the amount and manner of its payment. His demeanor and conduct as revealed by himself and others was hardly that of a man who was being held up and compelled to relinquish the accumulation of years of work wholly against his will. It may be conceded that he shows that he acted reluctantly; but that is not enough. It must appear that his will was overpowered by the threats or menaces of others. This does not so clearly appear as to call for the setting aside of the agreement. It may be, as we have already said, that defendants had no just claim against the plaintiff, or that the claim, if one they rightfully had, was exaggerated, and that he paid them an exorbitant sum; but if that was a fact he knew it then as well as he knows it now, and then was the time for him to assert his rights.

We find no ground upon which to reverse the judgment below. In so ruling we must not be understood as finding or affirming the guilt of the plaintiff upon the charge made against him by the defendants. What we find is that the evidence is insufficient to establish his allegation that the settlement and payment made by him were obtained by duress or undue influence or were part of an unlawful scheme to compound a felony. It follows that the decree of the district court must be affirmed.

There is a second appeal in this case taken from an order of the district court amending the record to show that the decree was not spread upon the journal until after plaintiff's original appeal was taken. The record in this respect is substantially like that which we considered in *Owens v. Hatchet Co.*, 147 Iowa, 393. Under the rule there approved the record sufficiently showed an appealable judgment, and therefore the correction of the entry did not affect the appeal which had been taken. The appeal

3. APPEAL:  
amendment  
of record.

therefrom was entirely unnecessary to the protection of the appellant's rights.

The decree of the district court is therefore *affirmed*.

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OSCAR SWAYNE, Appellant, v. JOHN E. TILLOTSON and  
E. H. JONES, Appellees.

**Conditional sales: MORTGAGES: PRIORITY OF LIENS.** The seller of  
1 personal property under an unrecorded contract of conditional  
sale can not, by a seizure of the property for nonpayment prior  
to the recording of a mortgage given by the purchaser upon the  
property, put himself in the position of a subsequent purchaser  
without notice.

**Chattel mortgages: DESCRIPTION OF PROPERTY.** The description of  
2 the property involved in this action as, "one Schiller piano," is  
held to have sufficiently identified the property as against the  
seller who had not recorded his contract of sale, since he was not  
a subsequent purchaser without notice.

**Same: EXTRINSIC EVIDENCE.** As between the parties, except attaching  
3 creditors or subsequent purchasers without notice, the descrip-  
tion in a chattel mortgage may be aided by extrinsic evidence.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN, Judge.

TUESDAY, SEPTEMBER 27, 1910.

THE *opinion* states the case.—*Reversed*.

J. A. Dyer, for appellant.

Dudley & Coffin, for appellees.

WEAVER, J.—In the year 1901 the defendant Jones delivered to the defendant Tillotson a Schiller piano, under a contract of conditional sale which described the



instrument by its style and number, and provided that the title should remain in the seller until the price was fully paid. Only a small portion of the agreed price was ever paid. The contract was never recorded. In the year 1906 Tillotson borrowed money from the plaintiff, Swayne, and to secure its repayment gave him a chattel mortgage upon property described as one Schiller piano without other description or designation. This mortgage was not recorded until March, 1907, and after Jones, acting under the conditional contract of sale, had retaken the piano. The description of the piano in the mortgage was too general and indefinite to impart constructive notice to any one of the identity of the property sought to be covered thereby, and neither Swayne nor Jones had any actual notice of the other's claim to or upon the property until after the latter had repossessed himself thereof. This action is brought to determine the priority of right between these two claimants.

The case seems to be governed by *Sheets v. Poff*, 123 Iowa, 714. There Sheets sold a piano to Poff taking a chattel mortgage to secure deferred payments, but the mortgage was not recorded. In this situation Poff gave another mortgage to Hollaway. Later, and before the latter mortgage was recorded, Poff absconded, and Sheets seized the piano under his mortgage, and began action to foreclose it. The trial court held, in effect, that the seizure under the prior unrecorded mortgage gave Sheets priority over the holder of the second mortgage. On appeal this court reversed that ruling and decided in substance that, as the statute (Code, sections 2905, 2906) declares that no mortgage or conditional contract of sale shall be valid against existing creditors or subsequent purchasers without notice, such invalidity can not be remedied or avoided by seizing the property under the first claim before the holder of the second mortgage records his lien. In other words, it

1. CONDITIONAL  
SALES: mort-  
gages: priority  
of liens.

holds that the owner of the invalid or unrecorded first mortgage can not by a seizure of the property thereunder put himself in the position of a subsequent purchaser without notice as against the unrecorded second mortgage. If we are not to overrule the cited case, there seems to be no escape from a reversal of the judgment below. Whether the same rule would apply if Jones, instead of taking possession of the piano under the contract of sale, had procured it by a new contract with Tillotson based upon a new or additional consideration, we need not here decide.

Appellee seeks to avoid this result by the argument that there is nothing in the record to identify the piano in controversy as the one covered or sought to be covered by plaintiff's mortgage, and that, in any event, the mortgage is void because of uncertainty of description. But the mortgage is not void except as against subsequent purchasers without notice.

2. CHATTEL  
MORTGAGES:  
description  
of property.

As between the parties the description, however imperfect, may be aided by evidence *aliunde*, and the property intended to be mortgaged thus pointed out.

3. SAME:  
extrinsic  
evidence.

*Clapp v. Trowbridge*, 74 Iowa, 550; *Ordway v. Kittle*, 83 Iowa, 752; *Gammon v. Bull*, 86 Iowa, 756. No one but attaching creditors or subsequent purchasers without notice can object to the sufficiency of the description and the rule applied in *Sheets v. Poff*, *supra*, excludes from the list of subsequent purchasers all who occupy the relation which is held by the appellee herein. Moreover, the answer seems to concede the identity of the piano.

It follows that the judgment of the district court must be reversed.

E. E. GRISWOLD and HATTIE GRISWOLD, Appellees, v.  
ANDREW DUGANE and ROSE ADAMS, Appellants.

**Usury:** PLEADINGS: SUFFICIENCY. Where the petition in an action  
1 for the recovery of instruments evidencing an indebtedness from  
plaintiff to defendant disclosed that the return of the instruments  
was sought on the ground that the money borrowed in the trans-  
action had been fully paid, with lawful interest, and that under  
the facts alleged defendant was not entitled to retain the instru-  
ments unless some of the payments were made as commissions  
for procuring the loan, the question of usury was in issue and  
was properly submitted to the jury.

**Same.** Any agreement made by a borrower with one acting as the  
2 agent of the lender to pay a commission in addition to the maxi-  
mum rate of interest will render the transaction usurious.

**Trial:** REMARKS OF COURT: PREJUDICE. Where the question of the  
3 genuineness of a signature was immaterial the remarks of the court  
in excluding evidence upon that subject are held to have been  
nonprejudicial.

**New trial:** MOTION TO STRIKE: HARMLESS RULING. Any error in strik-  
4 ing from the record a motion for a new trial is not prejudicial,  
where the party by appeal may raise every ground urged in sup-  
port of the motion for a new trial.

*Appeal from Linn District Court.*—HON. MILO P. SMITH,  
Judge.

TUESDAY, SEPTEMBER 27, 1910.

ACTION in replevin to recover the possession of cer-  
tain instruments purporting to show an indebtedness from  
plaintiffs to the defendant Rose Adams and certain other  
instruments purporting to assign to said Rose Adams  
by way of security the wages to become due to the plain-  
tiff E. E. Griswold from the Chicago, Rock Island &

Pacific Railroad Company. The fact alleged as a basis for the recovery of the possession of the instruments was substantially that the indebtedness represented and secured thereby had been extinguished. The defense was that the sum of \$100 yet remained due, evidenced and secured by said instruments. There was a verdict for the plaintiffs, and the defendants appeal. *Affirmed.*

*E. W. Griffiths*, for appellants.

*C. W. Bingham*, for appellees.

McCLAIN, J.—It is perfectly clear, under the evidence, that the instruments in question were executed in a transaction between plaintiffs and defendant Dugane relating to the borrowing of money in which plaintiffs received at one time \$80 and at another time \$20, and that within one year plaintiffs had paid to Dugane the sum of \$110 which had been more than the money received, with interest thereon at eight percent, the largest percent which can lawfully be contracted for in this state, and that, if the transaction was in fact or effect a loan of money by Dugane to the plaintiffs, then no further sum was due on, or secured by the instruments in question, and the plaintiffs were entitled to the possession thereof. To meet this *prima facie* case the defendants alleged and sought to prove that Dugane in fact was loaning the money of his codefendant, Rose Adams; that he exacted from the plaintiffs in addition to the legal rate of interest to be paid to her a further sum by way of commission for procuring the money for plaintiffs; and that the payments made by the plaintiffs, were so made and had been applied first to the extinguishment of said commission, leaving the sum of \$100 still due from plaintiffs to Rose Adams. It may be conceded that the instruments introduced in evidence tended to show the creation of an in-

debtedness of plaintiffs to Rose Adams to the sum of \$150, but, whatever may have been the nature of the instruments, if as a matter of fact the transaction was a loan of money by Dugane to plaintiffs in the total sum of \$100, and this amount of money with lawful interest thereon had been repaid to Dugane, then the indebtedness had been extinguished and Rose Adams (who did not claim to be an innocent purchaser for value or to otherwise have acted in the transaction except through Dugane who represented her) had no further right under the instruments. The statute expressly prohibits the receiving directly or indirectly in money or any other thing of value any greater sum or value for the loan of money than the statutory rate of interest. Code, section 3040. Appellants do not controvert this general proposition, but they insist, first, that the question of usury was not raised in the case and that the instruction of the court submitting that question to the jury was therefore erroneous; and, second, that the evidence did not support the verdict.

I. While it is true that the word "usury" is not employed in the pleadings, it is perfectly apparent that the plaintiffs were claiming the return of the instruments on the ground that the money borrowed in the transaction with Dugane with lawful interest thereon had been paid, and that the defendants perfectly understood that, under the facts relied on by the plaintiffs, they were not entitled to retain possession of the instruments unless the fact that some of the payments made to Dugane were by way of commission for the procurement of a loan could be established. The question of usury was therefore raised by the allegations of the pleadings, and was properly submitted to the jury.

II. The only question of fact about which there was any real controversy was whether the money advanced

1. Usury:  
pleadings:  
sufficiency.

to plaintiffs by Dugane was so advanced by him as lender or was money procured by him as agent for plaintiffs from Rose Adams; for it is perfectly clear that, if Dugane acted as agent for Rose Adams, any commission agreed upon in addition to the legal rate of interest of eight percent would render the transaction usurious. *McNeely v. Ford*, 103 Iowa, 508; *Weaver v. Burnett*, 110 Iowa, 567. Now the evidence quite clearly shows that plaintiffs in dealing with Dugane did not understand that he was acting as their agent to procure a loan from Mrs. Adams. This question was properly submitted to the jury, and the verdict has ample support in the evidence.

III. Complaint as to a remark made by the court in excluding certain evidence is without merit in view of the form in which the case was submitted to the jury.

3. TRIAL: remarks of court: prejudice. The evidence excluded related to the genuineness of the signatures of Mrs. Griswold to certain instruments introduced in evidence, and, as the genuineness of such signatures was in no way material, what was said by the court in excluding the evidence with reference thereto could not have been prejudicial to the defendants.

IV. Error was assigned in striking defendant's motion for a new trial from the records on the ground that no copy thereof was filed with said motion. The ruling seems to have been in accordance with the provisions of the statute; but, at any rate, it was not in the least prejudicial to the defendants, for in their appeal they have had the advantage of every ground for new trial set up in their motion. The judgment is *affirmed*.

4. NEW TRIAL: motion to strike: harmless ruling.

DIETRICH KIRCHOFF, Appellant, v. HOHNSBEHN CREAM-  
ERY SUPPLY Co.

**Master and servant: UNCOVERED MACHINERY: STATUTE: NEGLIGENCE:**

- 1 EVIDENCE. The statute requiring factory machinery to be properly covered is intended as a protection against the carelessness and ignorance of those who may incidentally come in' contact therewith, and for the benefit of operatives, who by reason of inadvertence or misfortune, might be injured thereby. The operation of a planing machine which is not properly covered as provided by the statute is negligence on the part of the employer, and in that sense must be regarded as dangerous; and it is immaterial that similar planers were in use in other factories or that the one in question was of standard make.

**Same: SUBMISSION OF ISSUES.** Where the proof is such that an

- 2 issue of fact is raised concerning the proper protection provided for machinery, the jury should be informed of the provisions of the statute and instructed as to what would constitute a proper cover; and if it conclusively appears that the machinery was not properly covered the jury should be so told, and also that in permitting its operation in that condition the master was negligent. In this action for injury to plaintiff while operating a planer the evidence is held to show that the machine was not properly covered, within the meaning of the statute, and that the court erred in submitting the question of whether it was a dangerous machine.

**Same: ASSUMPTION OF RISK: INSTRUCTIONS.** Ordinarily where one

- 3 of mature years knows of the dangers incident to the operation of machinery it will be assumed that he appreciated the risk. And the knowledge exacted is that of the condition or defect in the machine, and the appreciation relates to the danger arising from its operation in that condition; and where the instruction of the court as given as clearly exacted proof of appreciation of the dangers as an element of assumption of risk as that requested, the requested instruction was properly refused.

**Same: DUTY TO WARN: EVIDENCE OF CUSTOM.** The necessity of warn-

- 4 ing employees of the dangers incident to the use of machinery arises out of the nature of the machinery, the dangers involved in its use, and the experience and intelligence of the employees;

so that proof of the custom of others to warn and instruct employees regarding the dangers arising from the operation of similar machinery is immaterial.

**Evidence:** LIKE ACCIDENTS. Evidence that no other like accident 5 had ever occurred in the operation of the machine in question was inadmissible on the question of negligence.

**Same:** ASSUMPTION OF RISK: CONTRIBUTORY NEGLIGENCE: EVIDENCE. 6 Under the evidence in this case the question of whether plaintiff assumed the risk or was himself negligent in the operation of the planer were for the jury.

*Appeal from Bremer District Court.*—HON. J. F. CLYDE,  
Judge.

SATURDAY, NOVEMBER 20, 1909.

ACTION for damages resulted in a verdict and judgment for the defendant. The plaintiff appeals.—*Reversed.*

*Hagemann & Farwell* and *E. A. Dawson*, for appellant.

*Sager & Sweet*, for appellee.

LADD, J.—The defendant was engaged in manufacturing butter tubs and other creamery supplies, and in doing so operated machines such as a planer, groover, saws, and the like by steam power. The planer consisted of a steel shaft about three inches square, on which were bolted two blades about eighteen inches long and two and one-half inches wide. These were on opposite shoulders of the shaft, and extended over an eighth of an inch. There were bolts on the other shoulders by which to fasten blades when needed. The shaft was hung in an opening about six inches wide in a table or platform, and at either end was a pulley over which a belt run from the shaft below, and ordinarily turned the planer three thousand five hundred revolutions per minute. In front were



feed rollers which carried the board being planed over the knives. The only guard was "what is known as a 'hood guard.' It is simply a weight on the feed roller. It protects the knives from the front." It extended up and over to about the center of the knives, so that one feeding the machine could not see them. There was no other guard. In the morning of November 30, 1906, the plaintiff was engaged in planing tub bottoms about thirteen inches in diameter. He had his mittens on, and was putting the bottoms in or "feeding," and, as these came through, one Cook removed them from the other side. The evidence tended to show that, after several bottoms had passed through, the speed of the planer ran down, and another employee put rosin on the belt; also, that shavings piled up back of the machine. In the words of plaintiff: "The shavings were piled up in front of me, and higher up than where the boards came out. When I saw the shavings piled up there, I just reached over and tried to wipe them away, and my hand was caught." The result was the loss of his hand, because of which he demanded for damages. Several errors are assigned by appellant, of which appellee contends were without prejudice, for that the evidence was insufficient to sustain the allegations of his petition.

The court required the jurors to determine whether the machine was dangerous, and instructed them that, if it was, defendant should have informed plaintiff of the dangers, and otherwise it owed him no such duty. Exception is taken to this instruction, for that it is said to ignore the factory act directing that "all saws, planers, cogs, gearing, belting, shafting, set screws, and machinery of every description therein shall be properly guarded." Section 4999-a2, Code Supp. 1907. If the machine was not "properly guarded," the operation of it constituted negligence, and in that sense it must be

1. MASTER AND  
SERVANT: un-  
covered ma-  
chinery: stat-  
ute: negli-  
gence:  
evidence.

regarded as dangerous. *Woolf v. Nauman*, 128 Iowa, 261. This being so, it was not material that similar planers were in use in some other factories, or that they were of standard make. *O'Connel v. Smith & Son*, 141 Iowa, 1. "The statute is intended as a protection, not only against the carelessness and ignorance of those who may incidentally come in contact with dangerous machinery while moving about in its vicinity, but it is also intended as a protection to the operatives themselves, who by reason of inadvertence or some misfortune may be injured by it." *Callopy v. Atwood*, 105 Minn. 80 (117 N. W. 238, 18 L. R. A. (N. S.) 593). See, also, *Kinyon v. Railway*, 118 Iowa, 349; *Bromberg v. Laundry Co.*, 134 Iowa, 38.

Was this planer "properly guarded" within the meaning of the law? If the proof was such that but an issue of fact was raised, the jury should have been advised of the provisions of the statute, and instructed what would constitute a proper guard. If it appeared conclusively that the machine was not "properly covered," it should have been so told, and that in permitting its operation in that condition the defendant was guilty of negligence.

2. SAME:  
submission  
of issues.

The record is convincing that it was not "properly guarded." To guard the saw it must have been covered in some way, and Webster's Dictionary defines "cover:" "To overspread the surface of one thing with another; to envelop; to shelter; to protect; to lay or set over; to extend over." The Century Dictionary: "To put something over, or on so as to protect or conceal; overlay; overspread; envelop with something." The Standard Dictionary: "To overspread or overlay with something so as to protect or hide; overlap." As employed in this statute, the manifest meaning is that something shall be put over the machine so as to protect those coming in proximity of or using it from being injured from the

planing knives. What such guard shall be is not specified save in exacting that it shall be proper. According to the lexicographers, "proper" means "fit, suitable, appropriate"; and to be guarded "properly" is to be so covered as to reasonably accomplish the design of guarding. A planer or other instrumentality mentioned in the statute is properly guarded when the device attached is of material and construction such as will shield those operating it or moving near it from contact therewith when in motion, at least when practicable, without unreasonably interfering with the efficiency of the machine. If not reasonably suitable and calculated for this purpose, the cover is not proper, and the proprietor in omitting to obey the mandate of the statute is guilty of negligence. As previously stated, the tin or sheet-iron hood guard extended from above the front roller over to above the center of the blades. This protected the person feeding the planer in pushing boards in, but left the knives entirely unguarded further back. In other words, the covering was of but half the planer, and the evidence is undisputed that the other half might have been covered without interfering with its efficiency in operation. Indeed, the evidence was to the effect that in all the larger factories planers are provided with blowers, and had been for many years. The blower is described as a sheet-iron hood cut so as to fit the machine and joined to a pipe with a fanning attachment, so that the suction draws all the shavings from the machine. It covers the knives so that it is impossible to get into them without removing it. Where the blower is not in use, a sheet-iron cover is bolted to the hood guard mentioned, and extends back about eighteen inches. Either furnishes the employee and those whose duties call them near the machine complete protection, and no suggestion that either is not practicable is to be found in the record. We are of opinion that the court erred in submitting to the jury whether

it was a dangerous machine. In permitting the operation of the planer without being properly guarded, the defendant was negligent, and the jury should have been so informed.

II. Complaint is made of the tenth instruction, in that, as is said, the court did not exact proof of appreciation of the danger as an element of assumption of risk.

3. SAME: assumption of risk: instructions. Ordinarily, if one of mature years knows of the dangers, he may be assumed to appreciate them, and the instruction appears to proceed on this theory. That requested, confused knowledge of the danger with knowledge of the condition complained of, and in that respect was no clearer than that given by the court. The knowledge exacted is that of the condition or defect and the appreciation is that of the damage arising therefrom in the performance of the task assigned to the employee. If, notwithstanding such knowledge and appreciation, the servant continues at his task, he is held to have assumed the risk. This much is said in view of another trial, when a more specific instruction may prove helpful in aiding the jury to rightly decide the issues.

III. Plaintiff tendered proof of the custom and usage in other similar factories as to warning and instructing employees regarding the danger in planers and particularly to point out the knives. On

4. SAME: duty to warn: evidence of custom. objection, the proffered testimony was excluded and rightly so. The necessity to instruct does not depend on a custom, but on the nature of the machinery and dangers involved in its use and the experience and intelligence of the employee.

IV. Defendant's manager was asked: "In the eighteen years (during which the planer had been operated)

5. EVIDENCE: like accidents. was there ever a man hurt on that machine before Kirchoff got his hand hurt?" Over an objection as incompetent and immaterial the wit-

ness was allowed to answer: "No; never." This was error. *Hudson v. Railway*, 59 Iowa, 581; *Bell v. Railway*, 64 Iowa, 321; *Mathews v. City of Cedar Rapids*, 80 Iowa, 459; *Croddy v. Railway*, 91 Iowa, 598; *Langhammer v. City of Manchester*, 99 Iowa, 295; *Frohs' v. City of Dubuque*, 109 Iowa, 219; *Potter v. Cave*, 123 Iowa, 98. All these decisions are to the effect that proof of like accidents may not be received as substantive evidence of that in controversy. In *Heinmiller v. Winston Bros.*, 131 Iowa, 32, evidence that other gentle horses had been frightened by a steam shovel located near a bridge was held admissible as tending to show that a horse because of its nature was likely to be frightened by such an instrumentality so located. The distinction undertaken to be drawn between that case and those cited was that in the latter "the ultimate questions were whether the defects existed. If they did, it was immaterial whether others had been injured thereby, while here it must be proven that the shovel was calculated to produce a certain effect on a certain class of animals. The testimony is not admissible for the purpose of proving that plaintiff's horse was frightened by the shovel, but for the purpose of showing how it affected a certain kind of animals." The machine was in the same condition as when installed eighteen years previous, so that no issue as to defendant's knowledge was involved. It was charged with the notice of the enactment of the statute in 1902 requiring the planer to be properly covered, so that the only design of this evidence must have been to disprove that the accident was the result of the negligence mentioned. It was not admissible for that purpose, and could have had no bearing on other issues. The evidence should have been rejected.

V. Appellee contends that, in any event, the evidence was conclusive that plaintiff had assumed the risk, and had contributed to the injury by his own negligence.

If so, as the result would be correct, the errors pointed out could not have been prejudicial. But we think the evidence was such as to carry both of these issues to the jury. The plaintiff was thirty-seven years of age, had worked on a farm until 1905, and from July 1st of that year until January 27, 1906, for defendant, when he had fed the planer twelve or thirteen different times. He had worked at the planer every morning for about an hour during the two weeks prior to receiving the injury in the morning of November 30, 1906. According to his testimony, he had given no attention to the construction of the machine; his duty being merely to lay the boards on the table, so that the roller in front caught and let them go through. He was not bound to inspect the machine to ascertain whether defendant had obeyed the law requiring it to be properly covered, but might assume that this had been done. He testified that he had never seen the knives, and thought them lower and closer to the front rollers, and that they were covered, and that he reached over ten or twelve inches farther than he supposed the knives were in the attempt to brush the shavings away. If it was improper to wear mittens in operating the machine, he does not appear to have known it. He had not seen the shavings pile up before, and yet, according to two witnesses, they should have been cleared away, and it was his duty to remove them. The knives could not readily be seen. A witness testified that the planer shaft "looks just like a square piece of shafting with bolts on all four sides," and that "an inexperienced man might see the knives, and not know they were knives at all. They don't look like any sort of a knife except a planer knife, which is different from any other kind of a knife. Until you notice carefully, they appear just like a square shaft, and, after noticing carefully, you find that there is a cutting edge projecting over these shoulders an eighth of an inch. Its

6. SAME:  
assumption  
of risk:  
contributory  
negligence:  
evidence.

brightness, the putting of your fingers on it, or getting up close to it, or making a careful examination, is all that would disclose to an inexperienced man that it in fact was a knife at all." It is apparent, then, that the issues as to whether plaintiff knew, or in the exercise of ordinary care must have known, of the condition of this machine, and whether he appreciated the danger in undertaking to clear the shavings away while it was in motion, were open for the determination of the jury, as was that of contributory negligence.

The errors pointed out were not obviated as contended, and the judgment is *reversed*.

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PETERSON and FROST v. W. H. KISSELL and ED CANNING,  
Sheriff of Pottawattamie County, Appellants.

**Pleadings: AMENDMENT: FAILURE TO COMPLY WITH ORDER OF COURT:**

- 1 JUDGMENT FOR DEFAULT. Where a party fails to amend his pleading within the time fixed by the court a default judgment will be entered against him on the demand of the other party; and in this action in replevin the petition was properly dismissed upon plaintiff's failure to make it more specific as required by the order of the court.

**Replevin: PLEADINGS: DISMISSAL OF ACTION FOR DEFAULT: EXTENT OF**

- 2 JUDGMENT. In this action the plaintiff replevied cattle, alleged his ownership and that they were distrained by defendant, but the petition was dismissed before answer because of plaintiff's failure to make it more specific as ordered, and judgment was entered against plaintiff and his sureties on the replevin bond for the value of the cattle. *Held*, that the dismissal of the action merely precluded plaintiff from proving the facts alleged in the petition, and the only judgment which could be entered was one awarding possession of the cattle to defendant or their value, and that the question of title could not be adjudicated because not put in issue by defendant.

**Same: DISMISSAL OF ACTION FOR DEFAULT: WHAT MATTERS CONCLUDED**

- 3 THEREBY. Where the defendant in an action of replevin failed to take issue on the question of ownership of the property, a

judgment of dismissal of the action because of plaintiff's failure to make his petition more specific was not a bar to a subsequent action to determine the title to the property; as the only question determined in the former action was the right of possession.

*Appeal from Pottawattamie District Court.*—HON. W. R. GREEN, Judge.

THURSDAY, APRIL 7, 1910.

ON March 2, 1904, the plaintiff began an action in replevin to recover possession of eleven head of cattle, alleging his ownership thereof, that their value was \$165, and that the cause of detention according to his belief was that they had broken into a field occupied by defendant, who had taken and detained them. The defendant on April 12th moved that plaintiff's petition be made more specific. This motion was sustained, and on October 7, 1904, the court ordered that, unless the ruling was complied with before the following Wednesday, the action would be dismissed. The plaintiff having failed to plead farther, the court on November 10, 1904, dismissed the petition because of such failure to amend and entered judgment against plaintiff and the sureties on the replevin bond for the sum of \$165, being the value of the cattle as alleged in the petition, and for costs. An appeal was taken to the Supreme Court, and there affirmed on motion. This action was begun some time afterwards, and in the petition the facts recited, save the appeal, are alleged; also that plaintiff was owner of the cattle, their distraint by defendant for damages for which he demanded the sum of \$15 before suit and at no time claimed to own the cattle, denied that they caused any damages, but prayed the court to determine the amount thereof, if any, and tendered whatever amount the court might determine was owing him; that the former judgment did not determine the ownership of the cattle, and asked that



such ownership be determined, that defendant be adjudged to have no interest therein save his lien, if any, for damages which plaintiff offered to pay, and that upon payment the judgment for the value of the cattle be canceled, and defendants restrained from enforcing the same. The answer interposed the former proceedings as a bar to the relief prayed, and averred that defendant held the cattle because of damages done to his property, that taking them deprived him of the power to subject them to payment of damages done, and prayed that he be permitted to go hence with his costs. The evidence adduced established plaintiff's ownership at the time in question, that they had broken into defendant's fields, and according to his testimony had been fed by him equivalent to one head for two hundred and fifty-five days. He estimated the value of so keeping them at twenty cents a day, or \$51. Plaintiff's evidence indicated the damages to have been much less, and the court fixed these at \$30, and upon the payment of the same and costs of the replevin suit by decree set aside and canceled the judgment. The defendant appeals.—*Affirmed.*

*Turner & Cullison*, for appellants.

*John Fletcher*, for appellees.

LADD, J.—The record discloses that an action in replevin, begun by plaintiff, was dismissed because of failure to comply with an order of court to make their petition more specific. Such petition alleged that plaintiff was absolute owner of cattle valued at \$165, and that, according to his belief, defendant held them in dstraint; they having broken into his premises. No answer appears to have been filed, nor does defendant appear ever to have challenged plaintiff's title to the cattle. Nevertheless, the district court upon dismissal of the petition entered judgment

in favor of the defendant for the value of said cattle as alleged in the petition. The plaintiff in this suit prays that the amount of damages be determined, and that upon their payment with costs of that action the judgment for the value of the cattle be canceled, while defendant contends that the entry of judgment for the value of the cattle was but an error or irregularity in that action, and must have been corrected on appeal, and that for this reason the court in this suit is without authority to grant the relief prayed.

If the court in entering the judgment was without jurisdiction, there was no error. *Leonard v. Insurance Co.*, 101 Iowa, 482. It does not follow, however, that, if

1. PLEADINGS:  
amendment:  
failure to  
comply with  
order of court:  
judgment for  
default.

the entry was within the court's authority, the present suit may not be maintained, for the remedy sought is not to annul or modify the judgment in the replevin action, but to adjudicate the title or interest of the respective parties in and to the chattels in controversy. Such title or interest has not been ascertained in the former suit. Therein the court rightly exacted prompt obedience to its orders (*Becker v. Becker*, 50 Iowa, 139), and it did not err in defaulting plaintiff for failing to make the petition more specific within the time designated. Section 3788 of the Code declares that "if a party fails to file or amend his pleading . . . by the time fixed by the court . . . judgment by default may be rendered against him on demand of the adverse party, made before such pleading is filed." A default is the failure to take the step required in the progress of an action, and a judgment by default is a judgment against the party who has failed to take such step. Such a judgment ordinarily is interlocutory, and not final in form, for upon entry something more is essential to the disposition of the cause. Such a judgment in a replevin suit precludes the party at fault from proving the allegations of his petition, and

this was the effect of the court's order of dismissal. The property having been wrested from defendant's possession by the extraordinary process of the court, restoration thereof necessarily followed in the absence of pleadings in order to put the parties *in statu quo*. To this was added by the judgment of default an adjudication that defendant was entitled to possession. And judgment for the return of the cattle or their value was proper. *Manix v. Howard*, 82 N. C. 125; *Collamar v. Page*, 35 Vt. 387.

But, in the absence of any assertion of title or interest in or lien on the property by defendant in an appropriate pleading, nothing of the kind was before the court. How

2. REPLEVIN:  
pleadings:  
dismissal  
of action for  
default:  
extent of  
judgment.

could it know or determine the nature or extent of defendant's interest in the absence of any pleading? Possibly all required was a demand to terminate his right of possession, or he may have held under a chattel

mortgage or an adjuster's lien or in distraint for damages. Shall the court pass upon every possible right or claim of defendant without these being appropriately pleaded? We think not. Had these been set up by way of answer, issue might have been joined thereon and his claimed rights adjudicated. *Crist v. Francis*, 50 Iowa, 257. But the defendant's claim to or interest in the property was not put in issue. Apparently he was content to have the possession of the property or value thereof restored, and leave other issues for future adjustment. That such a remedy was available to him appears from *Funk v. Israel*, 5 Iowa, 438, in which certain intoxicating liquors seized under a search warrant were replevined from the officer who had served the warrant. The court approved the ruling of the trial court in having dismissed the petition on the ground that the action could not be maintained and entering judgment in favor of the officer for the possession or value of the liquors. But the title to the liquors was not adjudicated, and manifestly, upon a subsequent judg-

ment in the search warrant proceedings being entered deciding these not to be contraband, but in the legal custody of plaintiff, the judgment in favor of the constable would be no bar to the assertion of title thereto.

As said, this defendant might have had a trial on the merits in the replevin suit, but he did not avail himself of that right, and for this reason that judgment is not an obstacle to the present inquiry. *Bet-*

3. SAME: dismissal of action for default: what matters concluded thereby.

*tinson v. Lowery*, 86 Me. 218 (29 Atl. 1003); *Hanchett v. Gardner*, 138 Ill. 571 (28 N. E. 788); *Hall v. Smith*, 10 Iowa,

45; *Manning v. Manning*, 26 Kan. 98. Had the court entered judgment restoring possession of the cattle to defendant, this would determine no more than the right of possession, and the latter must have enforced his lien for damages as provided by law. The circumstance that judgment for their value was entered in lieu of the return of the cattle does not change the situation. The plaintiff was furnished process which required the officer to take the specified property from the defendant, notwithstanding he might have been the rightful owner. To prevent the writ from working any wrong, the statute exacts before its issue the execution of a bond with sufficient surety in favor of defendant, conditioned, among other things, for the payment of any judgment which may be recovered against him. This security virtually takes the place of the property replevined, and, as the plaintiff asked what is in the nature of a judgment *in rem*, the *res*, so far as the defendant is concerned, is after the replevy represented by the replevin bond. *Walko v. Walko*, 64 Conn. 74 (29 Atl. 243). For this reason, the statute allows the defendant to have judgment for the restoration of possession or for the value of the property against plaintiff and the sureties on the bond. Sections 4176, 4178, Code. Where, as in the case at bar, the property has been distrained for damages done to crops and defendant asserts no other claim thereto,

such a judgment furnishes quite as available security as the possession of the animals against which to enforce his lien. Though such relief was available without pleading, it did no more than put the parties *in statu quo* with an adjudication of defendant's right of possession. • The better practice is to require the defendant in such a case to allege whatever title or interest he may claim and settle the controversy in the replevin suit, but, when this is not done, neither party is barred from asserting their rights, other than that of plaintiff to possession, in another action.—*Affirmed.*

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HENRY FREY v. J. T. STANGL, Appellant.

**Pleadings:** ELECTION OF REMEDIES: NONPREJUDICIAL RULING. Where

- 1 the original petition in an action embracing several counts is superseded at the trial by an amended and substituted petition, no prejudice arises by a refusal of the court to require the plaintiff to elect on which count of the original petition he will proceed.

**Trial:** CONFLICTING EVIDENCE: SUBMISSION OF ISSUES. Under conflict-

- 2 ing evidence the question of whether money paid and sought to be recovered back was paid pursuant to a written contract between the parties, or in part performance of a subsequent oral contract, was for the jury.

**Real property:** ORAL CONTRACT TO CONVEY: PART PAYMENT: DUTY OF

- 3 VENDOR. Where the vendee pays money in part performance of an unenforceable oral contract for the purchase of land, the law implies a promise by the vendor to repay the same, or to perform the contract on his part.

**Same:** RECOVERY OF MONEY PAID IN PART PERFORMANCE. An oral con-

- 4 tract for the sale of land is enforceable as between the parties unless the making of the contract is denied by the pleadings, as provided by the statute; and a vendee can not repudiate the agreement and recover money paid in part performance where the vendor is ready and able to perform his part of the contract.

**Same:** STATUTE OF FRAUDS. Where the vendor denies making an

- 5 alleged oral contract for the sale of land and pleads the statute of frauds the vendee may recover the amount paid in part performance.

**Same:** RECOVERY OF AMOUNT PAID: DEMAND. Where the vendor of  
6 land by oral contract, as in this case, failed to join with his wife  
in the execution of a deed to property and left the state without  
communication with the vendee on the subject, the vendee was  
entitled to recover the amount paid on the contract without pre-  
vious demand.

**Evidence:** MOTION TO STRIKE. A motion to strike the entire answer  
7 to an interrogatory should be denied where a portion of the  
answer was proper.

*Appeal from Carroll District Court.*—HON. Z. A. CHURCH,  
Judge.

MONDAY, APRIL 11, 1910.

ACTION to recover for money paid on a parol contract  
for the purchase of land in Missouri resulted in judg-  
ment as prayed. The defendant appeals. *Affirmed.*

*Reynolds & Myers*, for appellant.

*Saul & Helmer*, for appellee.

LADD, J.—The parties hereto entered into a written  
contract March 11, 1904, by the terms of which plaintiff  
undertook to buy of the defendant for the consideration  
of \$16,000, two hundred and forty acres of land in Mis-  
souri. Therein he agreed to assume the payment of an  
indebtedness of \$6,000 and another of \$6,200 secured  
by trust deeds of the land, to execute a note to defendant  
for \$2,300 upon taking possession of the same with a  
deed of trust securing it, March 1, 1905, and presently  
to execute a note for \$1,500 payable without interest on  
that day. The instrument contained no recitals of what  
was required of defendant. On the same day the plain-  
tiff executed his note of \$1,500 payable to defendant, and  
the latter, shortly thereafter, indorsed it to a local bank.

The deal was never closed, but the plaintiff paid the note January 18, 1905, and in this action seeks to recover the amount so paid, with interest.

The original petition was in three counts, but as this was superseded by an amended and substituted petition, after introduction of the plaintiff's evidence in chief, the defendant was in nowise prejudiced by the refusal of the court to require plaintiff to elect on which count of the original petition he would proceed. The issues as finally joined involved inquiries as to whether, because of misrepresentations as to the date of the maturity of the indebtedness secured by trust deeds, the written contract was abandoned, and an oral agreement modifying it or in lieu thereof was entered into, as to whether the note of \$1,500 was paid by plaintiff to relieve himself of any obligation under the written contract or in part performance of the oral agreement, and as to whether in the latter event the statute of frauds of the state of Missouri operated to defeat recovery. The defendant expressly denied the making of any oral agreement for the sale of the land, and alleged that if one was made such statutes rendered it unenforceable.

That the written contract was abandoned and a subsequent oral agreement for the purchase of the land entered into which was not fully performed appears from the evidence. Whether the \$1,500 was paid to release plaintiff from his obligation under the written contract or in part performance of the subsequent oral agreement was submitted to the jury, and rightly so, as the evidence bearing thereon was in conflict. There was also a conflict in the evidence as to whether as a part of the oral agreement plaintiff undertook to execute new trust deeds and deliver to defendant his note secured by trust deeds on the land, and because of the exactions of the party

1. PLEADINGS:  
election of  
remedies:  
nonprejudi-  
cial ruling.

2. TRIAL:  
conflicting  
evidence:  
submission  
of issues.

holding these refused to carry out the oral agreement, or whether under this defendant was to procure the extension of time of payment of the indebtedness either under the existing trust deeds or upon the execution of new ones, and, owing to said exactions, he did not comply. In other words, there was some conflict in the evidence as to which party was at fault in not executing the oral understanding between them.

The main contention of appellant in argument is that the evidence concerning the oral understanding of the parties was not admissible because of the statute of frauds of

the state of Missouri, where the parol agreement was had. Conceding, without deciding, that the statute of that state is controlling, and that part payment did not operate as an exception thereto, it is to be

3. REAL PROPERTY:  
oral contract  
to convey:  
part pay-  
ment: duty  
of vendor.

said that the design of this action is not to enforce an oral modification of the written agreement or subsequent oral contract, but to compel the restitution of the money paid as part performance thereof. If the vendee paid the money on faith and in part performance of a nonenforceable oral agreement, the law implies a promise on the part of the vendor to repay the same, or else perform on his part. *Tucker v. Grover*, 60 Wis. 233 (19 N. W. 92); *Littell v. Jones*, 56 Ark. 139 (19 S. W. 497); *Pressnell v. Lundin*, 44 Minn. 551 (47 N. W. 161); *Welch v. Darling*, 59 Vt. 136 (7 Atl. 547; 29 Am. & Eng. Ency. of Law (2d Ed.) 836). These are decisions to the effect that the right of recovery depends solely upon whether the contract is binding on the vendor, holding that, if not, then recovery may be had for the part performance, regardless of who in fact repudiated the parol agreement. *Reynolds v. Harris*, 9 Cal. 338; *Flinn v. Barber*, 64 Ala. 193; *Brandeis v. Neustadt*, 13 Wis. 142. But the great weight of authority in this country, as well as in England, is to hold that where the vendee has



repudiated a parol agreement, or where the vendor stands ready, able, and willing to perform his contract, the latter may successfully defend by setting up the express contract and his readiness to comply therewith. The difference in the rulings seems to depend on the wording of statutes, those construed in the cited cases declaring an oral contract for the sale of land void. In this state such contracts are valid; the statute merely prescribing the rule of evidence concerning their proof. As between the parties, such agreement may be enforced as fully as though in writing, unless denied by the pleading, and may be established by the testimony of the adverse party. Sections 4627, 4628, Code. What may be the procedure in Missouri does not appear from the record, but the rule as last stated prevails in that state. *Luckett v. Williamson*, 37 Mo. 388; *Galway v. Shields*, 66 Mo. 313 (27 Am. Rep. 351).

As the contract is not void, it is manifest that the vendee may not recover money paid in part performance, if he has elected to repudiate the agreement, or if the vendor is ready, able, and willing to perform the agreement on his part. The authorities in general so hold. Thus in *Shaw v. Shaw*, 6 Vt. 69, the court said: "When one party has partly performed under such a contract, he can not recover over what he has done, unless the other party insist upon the statute and refuse to perform. This is too obviously just to require comment, and to disregard it would do violence to every leading principle. The contract can not be considered void as long as he, for the protection of whose rights the statute is made, is willing to treat and consider the contract good." *Lane v. Shackford*, 5 N. H. 130: "We are of the opinion that the plaintiff is not at liberty to treat the contract for the sale of land in this case as void, unless the defendant refused,

4. SAME:  
recovery of  
money paid  
in part  
performance.

or disabled himself, to perform it. If one man contracts with another to perform labor, and receive as a compensation the conveyance of a particular tract of land, although the contract to convey the land is not a proper foundation for an action, yet common honesty and fair dealing require that he shall not be at liberty to refuse the land and demand money until the other party has refused to execute the contract. But we have no doubt that in general, when a contract within the statute of frauds has been in part executed by one party, there is a plain remedy for such party to a certain extent in a court of law, if the other party fraudulently refuse to execute the contract on his part. If money has been paid, it may be recovered back. If labor has been performed, a compensation for it may be recovered." *Coughlin v. Knowles*, 7 Metc. (Mass.) 57 (39 Am. Dec. 759): "The provisions of the statute are not so broad as to entitle a party who has entered into an oral contract by which he is to receive a conveyance of land, and toward payment for which he has made advances in money, to set aside such contract as a nullity, and reclaim the money so advanced, the other party being no way in fault, being both able and ready to perform his contract, and to make the conveyance in the manner stipulated by the oral agreement." See, also, *Eaton v. Eaton*, 35 N. J. Law, 290; *Day v. Wilson*, 83 Ind. 463 (43 Am. Rep. 76); *Crabtree v. Wells*, 19 Ill. 55; *Venable v. Brown*, 31 Ark. 564, where it is said: "Where a person has paid money, or delivered property upon a parol contract for the purchase of land, which is void by the statute of frauds, he can not maintain an action to recover back the money or property so paid, or delivered, so long as the other party to whom the money has been paid, or property delivered, is willing to perform." *Richards v. Allen*, 17 Me. 296.

The reason for the ruling is thus stated in *Abbot v.*

*Draper*, 4 Denio (N. Y.) 51: "When the vendor refuses to go on with the contract, or has parted with his title so that he can not perform, he is then in the wrong, and, having himself put an end to the contract, there is no longer any consideration for the payments which has been made under it; and the law will imply a promise to restore the money. But can the law imply a promise to refund the money so long as the vendor is not in default? The payment was a voluntary one, made with a full knowledge of all the facts. Every time a payment was made and received the parties virtually said, 'Although the law will not enforce this contract, we will go on and carry it into effect.' The money is not received as a loan, but as a payment; and, so long as the vendor is able and willing to perform the contract on his part, he holds the money as owner, and not as a debtor. The consideration upon which the money was paid has not failed; and there is nothing from which a promise to repay can be justly implied." See Brown on Statute of Frauds, sec. 122.

It will be noted that defendant did not plead his readiness or ability to perform, and not only denied the making of the parol agreement, but interposed the statute of frauds of the state of Missouri as a defense. Though this did not constitute a defense to an action like this, it did indicate a denial of any obligation to perform the oral agreement if such there were, and surely in this state of the record it can not be assumed that, had plaintiff performed his part, the defendant would have conveyed the land. Even though plaintiff did not perform as agreed, recovery of the money paid in part performance ought not to be denied, unless it affirmatively appear that defendant was ready, willing, and able to have performed on his part; otherwise such part performance was without consideration. In other words, the denial of making the contract and the interposition of the statute of frauds amount-

5. SAME:  
statute of  
frauds.

ed to a repudiation of the oral contract, if any there was, and if the \$1,500 was paid in part performance of the oral agreement the plaintiff, in view of the condition of the pleadings, was entitled to recover. This in effect was what the jury were told in the eighth and ninth instructions.

Ordinarily, a previous demand is essential in such a case. *Abbot v. Draper, supra*. The circumstances, however, were such as to show conclusively that it would have been unavailing. Though defendant had a

6. SAME: recovery of amount paid: demand. deed duly executed by his wife in his possession, he did not join therein or deliver the deed, but without so doing or restoring the money to plaintiff immediately left the state, and communicated with him no further. This conduct obviated the necessity of a demand, as it plainly demonstrated an intention to appropriate the money previously paid.

The motion to strike the entire answer to the second interrogatory propounded in the deposition of Flook was rightly overruled; for, conceding a part to have been improper, the remainder was admissible. No

7. EVIDENCE: motion to strike. error appears in the ruling on the motion to suppress this deposition; the record not disclosing that the motion was filed in apt time. Section 4712, Code. As the answer to the second cross-interrogatory propounded to the witness Kirk was included in that to the first cross-interrogatory, the motion to suppress his deposition was rightly overruled. The papers in the attachment proceedings in the suit of the Bank v. Defendant were admissible as bearing on the arrangement in pursuance of which the note was paid.

We discover no error in the record, and the judgment is *affirmed*.

**GRANT THORNBURG V. C. D. DOOLITTLE, Appellant.****Abstracts of title: AGREEMENT TO FURNISH SAME: PERFORMANCE.**

- 1 Where abstracts of title were furnished the purchasers of property, taken possession of by them, and were under their charge for a part of the time, and nearly three years after the contract of sale the purchasers exchanged the property purchased for other property, there was an acceptance of the title furnished and a sufficient compliance with the contract to furnish abstracts.

**Mines and mining: CONTRACT OF SALE: RECOVERY OF PURCHASE PRICE:**

- 2 TENDER. In this action plaintiff contracted to sell defendants and others certain mining properties which he agreed to convey to a named corporation, and in consideration the second parties agreed to pay one-half of the capital stock of the corporation, partly in cash and the balance within a specified time, which each of the second parties bound themselves to pay in proportion to the stock subscribed for by them. The contract also fixed the capital stock of the corporation and provided that a portion of the same should be treasury stock and should be contributed to by the parties equally, the remaining stock to be deposited in a bank, and any portion of the shares belonging to the second parties were to be delivered to the directors of the corporation upon payment of a certain price per share, which should be applied on the amount due plaintiff so far as necessary to discharge their obligation to him. The agreement also provided that if any of the second parties failed to discharge their obligation due plaintiff the directors of the corporation should sell enough of their shares to make up the deficit. *Held*, that as the provision for issuance and distribution of the stock, in addition to procuring funds to operate the mines by the sale of treasury stock, was to secure the deferred payments owing plaintiff, the second parties were not entitled to their share of the stock deposited in the bank until their respective portion of the debt due plaintiff was paid; and that in this action against one of the second parties to recover his share of the deferred payments a tender of the stock was not necessary to enable plaintiff to recover.

**Same: CONSIDERATION.** The consideration for the obligation due plaintiff in this action was the conveyance of the property to the corporation, and not the issuance of the stock as provided in the contract.

**Same: ABSTRACT OF TITLE: EVIDENCE OF DEFECTS.** As plaintiff's con-  
 4 tract obligated him to deliver abstracts of title to the property  
 to the corporation he was under no obligation to furnish them  
 to subscribers to corporate stock who agreed to pay plaintiff  
 certain amounts in consideration of the conveyance. And any  
 conversation concerning defects in the abstracts furnished was  
 not prejudicial to defendant, in this action for the amount due  
 plaintiff from him, where the defect was subsequently remedied  
 and the title accepted.

**Same: PERFORMANCE OF CONTRACT: EVIDENCE.** Where, as in this case,  
 5 deeds and abstracts of title were received and retained by the  
 corporation without objection, an agreement of the shareholders  
 to negotiate an exchange of the property so purchased for other  
 property was competent evidence on the question of plaintiff's  
 performance.

**Evidence of value: HARMLESS ERROR.** Where a witness has testified  
 6 that he did not know the value of property it is error to permit  
 him to state that the same was considered worth a certain sum;  
 but under the facts of this case the admission of such evidence  
 is held to have been without prejudice.

*Appeal from Hamilton District Court.*—HON. R. M.  
 WRIGHT, Judge.

MONDAY, APRIL 11, 1910.

THE plaintiff, besides operating a hotel at Granite,  
 Ore., had certain mines known as "Morris mine" and  
 "Alice A." The latter was a placer mine, "just a mining  
 claim located;" but the former was a quartz mine to  
 which a patent had issued. In the summer of 1904 sev-  
 eral persons in Hamilton County, aided by others in Palo  
 Alto and Pocahontas Counties, were induced to enter into  
 an agreement with plaintiff, by the terms of which plain-  
 tiff, as party of the first part, undertook to convey by  
 warranty deed the "Morris mine" and the "Alice A."  
 by special warranty deed to the "Iowa Oregon Company,  
 a corporation organized under the laws of Oregon, and  
 deliver to it a good and sufficient abstract of title," show-  
 ing a clear and unincumbered title in said grantor for the

said "Morris mine" and a clear and sufficient title to said grantor for the said "Alice A," except such interest as the United States have therein. And in consideration said persons, as "parties of the second part, do hereby agree to pay for one-half ( $\frac{1}{2}$ ) of the capital stock of said 'The Iowa-Oregon Company,' the sum of twenty thousand dollars (\$20,000.00) at the following times and in the following manner, to wit: Ten thousand dollars (\$10,000.00) cash and ten thousand dollars (\$10,000.00) within one year from the date hereof, of which each of the said second parties do hereby bind themselves to pay only in proportion to amount of stock subscribed by each respectively, and nothing in this paragraph shall be construed to in any manner bind or make liable any of the said second parties for any sum or sums either in cash or time payments, other than that for which he himself subscribed." Then followed stipulations that the capital stock of said company be two hundred and fifty thousand shares of par value of \$1 each, of which ninety thousand shares should be placed in the treasury as treasury stock, one-half to be contributed by the party of the first part, and the other half by the parties of the second part, to be sold as directed by the board of directors at not less than par value until otherwise ordered and the proceeds expended in development of the property.

The remaining capital stock, consisting of one hundred and sixty thousand (160,000) shares, of which eighty thousand (80,000) shares are subscribed for by the party of the first part and eighty thousand (80,000) shares are subscribed for by the parties of the second part, shall be placed in the First National Bank of Baker City, Oregon, subject to the following conditions, to wit: Said board of directors of the said Iowa-Oregon Company may at any time make demand on said bank to deliver to them or their duly appointed agent any number of shares of the stock belonging to the said second parties, upon the payment or tender to said bank the sum of twenty-five cents

(0.25) per share for each and every share so demanded, which said sum of twenty-five cents (0.25) per share by said bank is to be placed to the credit of the said party of the first part, and said bank is here authorized and empowered to fill in a certificate in proper manner designating the number of shares for which said certificate shall be issued as per order, from the said board of directors of the said 'Iowa-Oregon Company,' setting out the names of the persons or person to whom said stock certificate is to be issued and the same forwarded to the secretary of the said company, who shall have the same properly executed, and all sums of money arising from the sale of any of the said stock so obtained by the said board of directors shall be placed to the credit of the parties of the second part in the aforesaid bank of Baker City, Oregon, the same to be applied so far as may be necessary toward the payment of any balance due the party of the first part at the time of the maturity of the said final ten thousand dollar payment, and the balance remaining after the said final payment to said party of the first part, shall be paid to the parties of the second part according to their respective interests as indicated by the number of shares held by each of said second parties. It is expressly agreed and understood by and between the parties hereto that the said second parties shall pay or cause to be paid into the said bank the sum of (\$10,000) ten thousand dollars to the credit of the said party of the first part, within one year from the date hereof, binding themselves individually each for his proportionate share as indicated by the number of shares of said stock held by him, but nothing herein shall be construed to hold any of the said second parties liable for any greater part of the said sum of ten thousand dollars than is by himself subscribed and paid. . . . It is further agreed and understood that in the event of the failure of any of the parties of the second part to pay his proportionate share of the remaining ten thousand dollars (\$10,000), as indicated by the amount of stock subscribed by him, the said board of directors shall cause, place or cause to be placed on the open market, the mining stock, a sufficient amount of his shares of said stock, and cause the same to be sold for the highest price obtainable, and the money so obtained shall be placed to the credit of his shortage



with the party of the first part and any of the shares remaining after the said shortage has been paid shall be the property of the said delinquent party, but should the number of shares subscribed by the said delinquent party be insufficient upon sale of the same, he shall be held personally liable to the said first party for any balance due.

The defendant paid \$1,000 upon the execution of the contract, and the object of this action is the recovery of the deferred payment of a like amount. Issues were joined and trial had, which resulted in a verdict and judgment as prayed. The defendant appeals. *Affirmed.*

*Wesley Martin*, for appellant.

*G. D. Thompson and Boeye & Henderson*, for appellee.

LADD, J.—The petition alleged the sale of two mines to the defendant and associates; that by their direction conveyances were executed to the Iowa-Oregon Company; that in consideration thereof they paid \$10,000 down and agreed to pay a like amount within one year; and that plaintiff was to receive forty thousand shares of the capital stock of said company of the par value of \$1 per share; that they entered into an agreement for the organization of said company with a capital stock of two hundred and fifty thousand shares; that by the terms of said agreement defendant became liable for \$1,000 of the deferred payment, for which sum, with interest, judgment was prayed. Subsequently, the petition was amended by alleging the execution of the deeds, furnishing of the abstracts and that the company had taken possession of the mines. The answer, as amended, interposed a general denial, save as otherwise appeared therein, admitted the execution of the contract, averred that it was without consideration, and was procured by fraud, in that plaintiff falsely represented

that he had paid \$20,000 for one-half of the mines, and that each of two subscribers had paid the amounts respectively subscribed and pleaded settlement. He further alleged that one hundred and sixty thousand shares of capital stock had never been deposited with the First National Bank of Baker City, Ore., as stipulated in the contract. The last allegation, with some others, was stricken on motion.

I. After plaintiff's evidence in chief had been introduced, defendant asked that a verdict be directed in his favor, for that such an abstract of title to the mine as agreed had not been furnished; that the

1. ABSTRACTS  
OF TITLE:  
agreement to  
furnish same:  
performance.

petition did not allege, nor the evidence prove, that plaintiff had deposited capital stock with the bank as required by the con-

tract. An amendment to the petition, alleging the furnishing of abstracts, and that the company had taken possession of the mines, was filed. In permitting this, there was no abuse of discretion. The evidence disclosed that abstracts were furnished to and retained by the company, that it had taken possession of the mines, that for a part of the time they were under the supervision of defendant, and that the stockholders, nearly three years after the making of the contract, entered into an agreement to exchange the property and stock for Missouri land. These circumstances sufficiently established the acceptance of the titles to the mines as in compliance with the contract.

The second ground involved the construction of the contract therein challenging the sufficiency of the petition, which also was done by motion in arrest of judgment. It

2. MINES AND  
MINING: con-  
tract of sale:  
recovery of  
purchase  
price: tender.

will be noted that the petition proceeds on the theory that plaintiff had sold to defendant and his associates certain mines. We think the evidence bears this out. The con-

tract recited that plaintiff had executed deeds of the mines which "shall be delivered" to the company, and that in

consideration thereof defendant and his associates "agree to pay for one-half of the capital stock of" said company \$10,000 in cash, and a like amount in one year, each to pay, in proportion to the amount subscribed, the entire amount to go to plaintiff. The conveyance of the mines to the company, and not the stock, was the consideration for which defendant and his associates undertook to pay the \$20,000. What follows fixes the interest of the respective parties in the company. Its capital stock was to be two hundred and fifty thousand shares of the par value of \$1 each. Plaintiff was to have half of this stock, and defendant with his associates one-half, but from each half forty-five thousand shares were to be contributed to the treasury; the remaining one hundred and sixty thousand shares were to be deposited in the First National Bank of Baker City, Ore., and plaintiff was not to sell any of his one-half within a year; forty thousand shares were to be issued to defendant and his associates and left in the bank until the deferred payment was met; but the board of directors of the company was authorized to procure of the bank any number of these on payment of twenty-five cents a share, the bank to insert the number of shares and the names of the parties entitled thereto in the stock certificates and forward to the secretary of said company to be properly executed. The moneys so paid were to be applied on the deferred payment, and, upon full payment, the bank was to deliver this first forty thousand shares and enough stock to make up the last forty thousand shares. It was expressly agreed, however, that defendant and his associates should pay, or cause to be paid, into the bank, the entire \$10,000 within one year, "binding themselves individually each for his proportionate share as indicated by the number of shares of stock held by him, but nothing herein shall be construed to hold any of said second parties liable for any greater part of the said sum of ten thousand dollars than is by himself subscribed and paid."

The defendant's portion of the deferred payment was \$1,000, and there is no pretense that he ever paid the same to the bank, and, unless released therefrom, this was owing plaintiff, not for stock, as assumed

3. SAME:  
consideration. by appellant, but as part of the consideration for the conveyance of the mines to the company. The contract is silent as to who was to organize the company; but it plainly indicates that this was to be done for the purpose of acquiring and operating the mines. The objects to be accomplished through the stipulation with reference to the issuance and distribution of stock were: (1) The awarding to each the interest in the mines to which he was entitled; (2) the procurement of funds for the operation of the mines through the sale of treasury stock contributed by the stockholders ratably; (3) the security of the deferred payment owing by defendant and others by the deposit of the stock with the bank. That the shares of stock to be issued to defendant and his associates were so held plainly appears from last clause of the contract authorizing the board of directors to sell the shares of any delinquent and apply the proceeds upon the amount due from him. And the parties to the agreement so construed the depositing stock as being for the security of plaintiff. One of the subscribers, B. F. Keltz, testified to having issued, as secretary, certificates for one hundred and sixty thousand shares, one-half of which was sent directly to the plaintiff. Though forty thousand shares issued to defendant and his associates were to be deposited with the bank, they were delivered to them, and the remaining certificates for the forty thousand shares were sent by Keltz to plaintiff's attorney, who retained them as collateral security on the deferred payments. The defendant knew this, and, upon being employed by plaintiff to collect the several amounts subscribed by his associates, arranged that plaintiff send certificates of stock as payments were made. Being held as security, the defendant

is not entitled to the certificate of four thousand shares until payment of the debt has been effected. It follows that there was no error in permitting recovery in the absence of the delivery or tender of the stock.

II. The ninth division of the answer was rightly stricken, for that plaintiff was not required to deliver an abstract of title to defendant or any of the subscribers, and the allegation that he had not done so constituted no defense.

The exclusion of the testimony of defendant concerning a conversation about the abstract was without prejudice, for the defect referred to was subsequently cured and the title accepted.

III. The shareholders of the Iowa-Oregon Company negotiated a contract for the exchange of the stock therein for Missouri land, and this was signed by all the shareholders, including defendant. This was received in evidence over objection. It was admissible as tending to prove an acceptance of plaintiff's performance of the agreement. Surely, after the company received the deeds to the mining claims and the abstracts of title thereto and retained them without objection for more than two years, an agreement of all the alleged purchasers of the mines to transfer the claims with their shares for land was material and competent evidence of acceptance.

IV. H. O. Hyatt had been manager at the mines a year and worked at other mines, but said he was unable to say what these were worth. He was then asked, "What in your opinion was the fair value of this mine in the fall of 1904?" Over defendant's objection that the witness had stated he did not know and was not qualified to answer, he was permitted to say, "Why, we considered the mine worth \$50,000 when we——." A motion to strike the answer as

4. SAME:  
abstract  
of title:  
evidence of  
defects.

5. SAME:  
performance  
of contract:  
evidence.

6. EVIDENCE OF  
VALUE: harm-  
less error.

not competent was overruled. That this was error appears from *Clausen v. Tjernagel*, 91 Iowa, 285. This was without prejudice, however, for its only bearing was on the plea of want of consideration, and defendant disposed of this by admitting as a witness that the mines were worth \$1,000.

Some other matters are mentioned in argument, but none requiring discussion.

The judgment is *affirmed*.

GEORGE P. JOHNSON, Appellant, v. THE BOARD OF SUPERVISORS OF STORY COUNTY and W. R. DODDS, Appellees.

**Constitutional law:** ESTABLISHMENT OF DRAINAGE DISTRICTS: NOTICE.

A legislative enactment will not be held unconstitutional unless it is plainly and palpably illegal. Under this rule the statute providing for the establishment of drainage districts upon notice by publication is not unconstitutional, as authorizing the taking of property without due process of law, because failing to provide for personal service upon residents of the county.

*Appeal from Story District Court.*—HON. R. M. WRIGHT, Judge.

WEDNESDAY, MAY 4, 1910.

SUTT in equity praying an injunction against the defendants to restrain them from constructing a drainage system across the lands of plaintiff. There was a demurrer to the petition, which was sustained. Plaintiff appeals. *Affirmed*.

*McCarthy & Luke*, for appellant.

*Fitchpatrick & McCall* and *E. H. Addison*, for appellees.

EVANS, J.—The following statement from appellant's argument is a fair presentation of the allegations of his petition:

On the 11th day of February, 1908, one Will Dodds, one of the defendants herein, filed a petition in the auditor's office of Story County, Iowa, asking the board of supervisors of said county to establish a drainage district which would run across the lands of plaintiff, and which would have its outlet, and discharge the water thereby collected, upon his said land. On the 18th day of February, 1908, said board of supervisors appointed an engineer to examine the lands described in said petition, survey the same, and to make a return of his findings in the matter to the county auditor as by law provided. Nothing more was done in the said matter until the 11th day of August, 1909, when the said engineer made his return and reported favorably on the establishment of the said drainage district. Thereupon the board of supervisors caused a notice to be published for two consecutive weeks in the *Ames Intelligencer*, a weekly newspaper published at Ames, Story County, Iowa, the last of which publication was on the 2d day of September, 1909. Said notice setting the date for hearing on the said petition for the 24th day of September, 1909. That no personal service whatsoever was served on the plaintiff herein, nor did he receive any actual notice of the said proposed hearing. That late in the evening of September 18, 1909, and after the auditor's office was closed for that day, he learned through others of the publication of the said notice. That the 19th day of September came on Sunday, and on the 20th day of September, 1909, he made out his claim for damages in the sum of \$1,500, and filed the same with the auditor of said county. That on the 24th day of September, to wit, the day set for hearing on the establishment of the said drainage district, he also filed in the auditor's office an affidavit setting forth these facts as to his not receiving notice or hearing of the same until late in the evening of the said 18th day of September,

1909, and asking the said board of supervisors to consider his claim for damages as though filed five days prior to the said 24th day of September. The board of supervisors refused to consider his claim, for the reason that it was not filed five days prior to the said 24th day of September, 1909, refused to appoint appraisers to ascertain the damages which this plaintiff might sustain by the construction of the said drainage system. They then established the said drainage district as prayed and asked in the said petition without any action other than as before stated in reference to the plaintiff's claim for damages.

The following statement of errors relied on contained in appellant's brief furnishes the basis and outline of his contention:

The parties affected by proceedings of this nature, who are actual residents of the county and state, are entitled to actual and personal service of notice. That the substituted section for 1989a3 of the Supplement to the Code, being section 3, of chapter 118 of the Acts of the Thirty-third General Assembly, providing for the establishment of drainage districts simply by publication of notice, is as to actual residents of the county and state void and unconstitutional, for the reason that it deprives such actual residents of their property without due process of law.

(2) That even, if the Legislature had the right to provide a substitute or constructive service in actions or proceedings of this kind as against actual residents of the county and state, then the notice provided for by said section above referred to is arbitrary, unreasonable, insufficient, and inadequate, for the reason that it is not such a notice as would be most apt or probable to bring the matter to the personal notice of the parties affected, and is therefore void and unconstitutional, for the reason that it deprives such persons of their property without due process of law.

(3) That the establishment of the drainage districts under the notice prescribed in the said section would result in taking private property for public use without just com-



pensation being first made or secured to be made, and is therefore void and unconstitutional under section 18 of the Bill of Rights of the state Constitution. That in this specific case the plaintiff's property is being taken for public use without just compensation being made or secured to be made, and the acts of the defendants are void and unconstitutional, under the said section 18 of the said Bill of Rights.

Appellant cites for our consideration authorities which hold that notice by publication is a drastic remedy, and is in contravention of the common law, and is allowable only out of necessity, and usually as against nonresidents only, or such as so absent themselves as to prevent personal service of notice upon them. Plaintiff's case, as shown by his petition, apparently involves much hardship. Whether he could have compelled the board of supervisors to have heard his claim for damages by proper proceedings under the circumstances shown in his petition, we have no occasion to consider. The one question presented for our consideration is whether the statute referred to is unconstitutional because it provides for notice by publication only even as against residents of the county who are available for personal service. We can not hold an enactment of the Legislature unconstitutional unless it is plainly and palpably so. The statute under consideration is a part of title 10 on the general subject of "Internal Improvements." This subject of "Internal Improvements" involves to a considerable extent the police power of municipal bodies. This is particularly so as to those improvements which affect the public health. We have held that even in such cases the Legislature has no power to dispense with all notice to property owners whose property is proposed to be taken, but we have never placed a limitation upon the power of the Legislature to prescribe the kind of notice and method of service. In the matter of assessment of benefits for such improvements, notice by

publication has been the usual method prescribed by statute, and the power of the Legislature to prescribe such method for such purpose has seldom been questioned. On that particular question the authorities are quite universal in support of a notice by publication. See *Lyman v. Plummer*, 75 Iowa, 353. We see no logical ground of distinction whereby we may say that the Legislature has power to prescribe a notice by publication for the purpose of assessing benefits, and yet has no power to prescribe such notice for the purpose of laying improvements through the land of a property owner. Plaintiff's argument here is well worthy of the consideration of the Legislature. The method prescribed undoubtedly may work great hardship, but the faults of the method can be readily corrected by the Legislature. We can not say that the enactment is void under the rules that govern us in passing upon the constitutionality of statutes. This was the conclusion reached by the trial court, and its order is *affirmed*.

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LENA SIMPKINS, as Executrix of the Will of H. E. SIMPKINS, Deceased, Appellee, v. THE HAWKEYE COMMERCIAL MEN'S ASSOCIATION, Appellant.

**Accident insurance:** CAUSE OF DEATH: SUFFICIENCY OF NOTICE. Proof  
1 of death under an accident policy indemnifying against death by external, violent and accidental means, which showed that death resulted from poison introduced into the system by an embalming needle, sufficiently established the cause of death, and that it was by external, violent and accidental means.

**Same:** EVIDENCE. Strictly speaking there can be no accident causing  
2 death, within the terms of a contract of accident insurance requiring written notice of the accident causing death within a specified time after the accident, so long as the insured lives; and that requirement is satisfied by notice in the proofs of death furnished shortly after it occurred. But in the instant case a notice of the accident was given within the required time, and

although the facts did not show a waiver of notice, they were sufficient to warrant an inference of the fact of notice.

**Accidental injury and death:** EVIDENCE. It is also held that the evidence is sufficient to show an accidental injury and the accidental nature of the death of the insured.

**Same:** EXEMPTION FROM LIABILITY: CONTACT WITH POISONOUS SUBSTANCES. Where, as in this case, an embalmer accidentally injured his hand with the point of an embalming needle, which was followed by blood poison resulting in death, the death was not from contact with poisonous substances within the terms of the policy exempting the insurer from liability in such cases.

**Insurance contract:** CONSTRUCTION. Where any of the provisions of a contract of insurance are open to different constructions the one most favorable to the insured will be adopted by the court.

*Appeal from Marshall District Court.*—HON. C. B. BRADSHAW, Judge.

TUESDAY MAY 10, 1910.

ACTION to enforce collection of a policy or certificate of accident insurance. Judgment for plaintiff as prayed, and defendant appeals. *Affirmed.*

*Bradford & Johnson*, for appellant.

*Cummings & Mote*, for appellee.

WEAVER, J.—The defendant is a mutual benefit association organized for the purpose of insuring its members, upon certain conditions, against personal injury and death from accidental causes. On July 9, 1906, H. E. Simpkins, an undertaker by occupation, residing and doing business at Marshalltown, Iowa, where the defendant's principal office is located, was duly admitted to membership in the association, and remained a member thereof in good standing until his death on February 2, 1907.

Among the benefits and indemnities assured to a member in good standing in said association its by-laws provide the following: Article 5, section 2: "Whenever a member in good standing shall, through external, violent, and accidental means, receive bodily injuries which shall, independently of all other causes, result in death within twenty-six weeks from said accident, the beneficiary named in his application for membership, or his heirs, if no beneficiary is named therein, shall be paid the proceeds of one assessment of two dollars upon each member in good standing, but in no case shall such payment exceed the sum of five thousand dollars, which shall be in full satisfaction of all liability to the said deceased member, his beneficiary, heirs or legal representatives." It is the claim of plaintiff that on or about January 9, 1907, said H. E. Simpkins, while engaged in the line of his business in embalming the body of a deceased person, accidentally wounded or punctured the palm of his hand with the point of an embalming needle or trocar, which induced or caused blood poisoning, from which death ensued some three or four weeks later. It is further alleged that within fifteen days from the date of such injury written notice thereof was given to said association, and that within sixty days of the decease of said member notice thereof with proof of the death was also duly served. It is also alleged that at the date of the death of said Simpkins there were in said association one thousand seven hundred and eighty members, but it has wholly failed to pay the amount of benefits to which the estate of the deceased is entitled, and has failed, neglected, and refused to levy any assessment upon its said membership for the purpose of paying such claim. A decree is asked ordering such assessment to be made and payment of the proceeds to the plaintiff. The answer of the defendant admits the membership of Simpkins in good standing at the date of his death, but denies all the other material

allegations of the petition. It also alleges that under one of its by-laws, when a member dies from natural causes, there shall become due to his beneficiary or his estate the sum of four cents per capita of the entire membership, and that by the terms of this provision there became due to the plaintiff as executrix the sum of \$71.60, which sum defendant tendered to plaintiff, who refused to receive it. Said tender is also brought into court and deposited for the plaintiff's acceptance and use. While numerous errors are assigned, counsel for appellant condense and confine the propositions relied upon under three heads, which we shall briefly consider in the order in which they are stated in the printed brief.

I. It is said that no notice was given the defendant of the alleged accidental nature of Simpkins' death. The record does not bear out the objection. Simpkins died on February 2, 1907. On February 4, 1907, proofs of death made out upon the blanks usually employed for that purpose were prepared by the attending physician and others, and furnished the defendant. In the physician's report it was stated in unequivocal language that death was caused by septic poisoning introduced by a needle, and that there was no remote cause of such fatal result. But counsel say this was insufficient, because the physician does not state specifically how the injury was inflicted, or that it was accidental. This is demanding a much higher degree of particularity than reason or the law requires. It has often been held that the notice required in such cases need not incorporate a minute and detailed history of the case. In *Correll v. Accident Society*, 139 Iowa, 40, we said that the requirement in cases of this character "is that the fact of death be stated, and, as far as known at the time, the cause thereof." So, too, where "full particulars" are demanded by the contract, it does not mean necessarily a complete recitation of all the

1. ACCIDENT IN-  
SURANCE: cause  
of death:  
sufficiency  
of notice.

facts, but enough to enable the insurer to intelligently pursue the inquiry if it desires to do so. Here the alleged cause of the death was clearly stated and attributed to a bodily injury caused by external and violent means. We think it also sufficiently conveys the information that such injury was accidental. If the proof or notice had shown that deceased had died of a knife wound or a gun shot wound, it would not be necessary to negative the idea that the injury was of a voluntary or suicidal character. The natural inference from such statement would be that such injury and death were accidental.

In this connection reliance is also placed on a clause of the defendant's by-laws, which reads as follows: "Provided, further, that the association shall in no event be liable to any beneficiary, heir or legal representative for any claim arising from the death of a member as aforesaid, unless such member, his beneficiary, heirs or legal representative for any claim arising from the death of a member as aforesaid, give written notice to the Secretary of the Association of the accident causing the death, within fifteen days after the happening of said accident, which notice shall state the full name of the member and contain full particulars of such accident, and shall also within sixty days from the time of such death furnish the Board of Directors with affirmative proof in writing of the death, and of its being the proximate result of external and accidental means." It is insisted that there was no compliance with this condition, and hence there can be no recovery. Strictly speaking, there can be no such thing as an "accident causing death," so long as the injured person lives, and in the nature of things "notice of the accident causing the death" is not possible until death has supervened, and, upon this construction, the provision above quoted would be satisfied by the information contained in the proofs of loss to which we have already called attention.

2. SAME:  
evidence.

But without resorting to such construction, and giving to the by-law the effect which counsel ascribe to it, we still think the record justifies the holding of the trial court. There is evidence that after the injury to Simpkins, and while he was sick therefrom, his son-in-law and partner in business prepared a written notice of such injury and delivered it to the defendant before the expiration of fifteen days from the date of the accident. This is not denied by any witness on the part of defendant, though its secretary, who appears to be its active officer, was on the witness stand, and had opportunity to do so had the fact justified it. Apparently in response to this notice the medical examiner of the association visited the injured man, saw the wound on his hand, and diagnosed the case as one of blood poisoning, and made report of the conditions discovered by him. Still further, when death occurred and proofs of plaintiff's claim were submitted, her attorney called at defendant's office, and in an interview with the secretary, who, as its counsel say, was the person "left in charge of the business," the latter based the defendant's refusal to pay not upon the failure to give notice, but upon a clause of the by-laws which excepted from the insurance injuries arising from "contact with poisonous substances." If, as argued, none of these things operate as a waiver of the necessity of notice, they are at least legitimate circumstances from which the fact of notice may be fairly inferred. The objection to the sufficiency of the notice can not be sustained.'

II. The second point made by the appellant is that the plaintiff's action was prematurely begun. This is but another form in which advantage is sought to be taken of the alleged failure to prove the service of notice of the accident and death; and, as we have already held that objection not well taken, we need not dwell longer upon that proposition.

III. The remaining objection made is to the suffi-

ciency of the proof of accidental injury to the deceased and the accidental nature of his death. Some of the essential features of this branch of the case have already been the subject of our consideration, and we shall not repeat what has been said thereon. There is direct and undisputed proof of an external wound on the hand of deceased and that blood poisoning therefrom caused his death. There is also shown a combination of circumstances clearly indicating that this wound had been received in embalming a dead body. As deceased became ill from such wound almost immediately thereafter and delirium and death soon followed, direct evidence concerning the facts immediately surrounding his injury can not be obtained, and, to ascertain the truth, we have to resort to the best evidence available. It is shown that deceased attended to the case of embalming on January 9, 1907, and on his return from that operation spoke of the injury received, and showed his injured hand. It is also shown by witnesses who were acquainted with the instrument that the shape and appearance of the wound were such as could have been produced by the point of an embalming needle or trocar. The wound itself was visible, tangible evidence that it was an effect produced by external violence, and the only fair inference drawn from the proved circumstances is that it was accidental. Indeed, in the absence of evidence to the contrary, the accidental character of a physical injury will be presumed. See *Jones v. Association*, 92 Iowa, 660, and cases there cited. The evidence as a whole is sufficient to satisfy the reasonable mind that such was the nature of the injury and the cause of the death. More is not required. The insurer can not be presumed to have provided for the performance of an impossibility as a condition of the promised indemnity. *Eggleston v. Insurance Co.*, 65 Iowa, 316; *Norton v. Insurance Co.*, 7 Cow. (N. Y.) 649; *Lawrence v. Insurance*

3. ACCIDENTAL  
INJURY AND  
DEATH:  
evidence.



Co., 11 Johns. (N. Y.) 260; *Trippe v. Provident Fund*, 140 N. Y. 23 (35 N. E. 316, 22 L. R. A. 432, 37 Am. St. Rep. 529); *Insurance Co. v. Boykin*, 79 U. S. 433 (20 L. Ed. 442); *McElroy v. Insurance Co.*, 88 Md. 137 (41 Atl. 112, 71 Am. St. Rep. 400).

But counsel suggest that, regardless of these considerations and assuming that deceased came to his death in the manner claimed by plaintiff, the appellant is relieved from liability because of a clause in the contract of insurance which excepts therefrom injuries arising "from the intentional taking of poison and from contact with poisonous substances." It appears to us very clear that the injury to the deceased in this case does not come within the excepted class here mentioned. A condition of this general nature is not unusual in accident policies, and has been the subject of consideration by the courts where death has resulted from blood poisoning following a wound, and in each instance it has been held not to be an injury "from contact with poisonous substances" within the meaning of the contract; it being the theory that death in such cases is in a legal sense the result of the wound, and that the infection of such wound is a mere incident to the original injury. *Ormberg v. Association*, 101 Ky. 303 (40 S. W. 909, 72 Am. St. Rep. 413); *Martin v. Indemnity*, 151 N. Y. 94 (45 N. E. 377; *Insurance Co. v. Rembe*, 220 Ill. 151 (77 N. E. 123, 5 L. R. A. (N. S.) 933, 110 Am. St. Rep. 235); *Cary v. Accident Co.*, 127 Wis. 67 (106 N. W. 1055, 5 L. R. A. (N. S.) 926, 115 Am. St. Rep. 997). Construing the words "injury from contact with poisonous substances," the Illinois court has said: "The rule is familiar that policies of insurance where they seek to limit the liability of the insurer must be construed against the company issuing the policy whose language it is. We do not think under that rule the language of the policy can be given the meaning here at-

4. SAME: exemption from liability: contact with poisonous substances.

tempted to be put upon it. If poisonous germs entered the wound causing blood poisoning, that would not be within the fair meaning of the policy, 'coming in contact with poisonous substances' causing death. Even if the germs were a poisonous substance within the meaning of the policy, those germs according to the testimony would have produced no poisonous effect but for the wound on the finger. They only became poisonous when mingled with the blood." *Insurance Co. v. Rembe, supra*. See, also, as announcing the same principle, *Jenkins v. Association*, 147 Iowa, 199; *Delaney v. Accident Club*, 121 Iowa, 528.

Counsel for appellant further say they may admit, for the sake of the argument, that the contract in suit as construed by them is a "harsh and difficult" one for the insured person, but insist that, even so, it is a lawful agreement, and therefore is one which the courts are bound to enforce. This may be a correct statement of the law as far as it goes, but it is settled by authorities and precedents too numerous to mention that, conceding the lawfulness of a given contract of insurance, if the language of any of its provisions is fairly open to different constructions, the one will be accepted which is most favorable to the insured. And we may add that there is such a fortunate if not providential flexibility and richness of meaning in words of the English language that the courts are not often seriously embarrassed in minimizing if not wholly neutralizing any apparent injustice of this nature.

Other matters mentioned in argument are sufficiently disposed of by the conclusions already announced. There is no reversible error in the record, and the judgment of the district court is *affirmed*.

5. INSURANCE  
CONTRACT:  
construction.

COLBY BROTHERS & COMPANY, Appellee, v. THE UNITED  
BREWERIES COMPANY, Appellant.

**Sales:** OVER-PAYMENT: RECOVERY: EVIDENCE. In this action to recover claimed over-payments for beer, on the ground that the barrels and kegs in which it was shipped contained a less quantity than represented, the evidence is reviewed and held to present a question for the jury.

**Instructions.** Where the instructions sufficiently guard the rights of a party he can not complain that the same were not more specific, in the absence of a request therefor.

*Appeal from Webster District Court.*—HON. R. M.  
WRIGHT, Judge.

THURSDAY, MAY 12, 1910.

ACTION at law to recover an amount alleged to have been overpaid to defendant on purchases of beer. Judgment for plaintiff, and defendant appeals. *Affirmed.*

*Henry & Henry*, for appellant.

*Healy & Healy* and *Kelleher & O'Connor*, for appellee.

WEAVER, J.—From July, 1901, to March, 1907, the plaintiff partnership was engaged in conducting five or six beer saloons at Ft. Dodge and vicinity, and during such period purchased large quantities of that article from defendant. It was delivered from time to time, as ordered, in casks or packages designated as barrels, half barrels, quarters, and eighths. It is agreed that the term

"barrel" as used in these transactions was understood by the parties to mean thirty-one and one-half gallons, and that the halves, quarters, and eighths were based upon said standard of measurement. The beer was supplied in two brands, one at \$4.75, and the other at \$5.75 per barrel. The itemized account appears to have been pleaded and put in evidence, but it is not included in the abstracts submitted to this court. It is shown, however, that the sales to plaintiff during the seven years mentioned aggregated one hundred and sixteen carloads, the invoice price of which amounted to about \$59,000, and that plaintiff had paid thereon something over \$56,000. In this action the plaintiff pleads the matters hereinbefore stated, and further alleges that, while defendant sold and delivered said beer in barrels and other packages with the representation and understanding that each barrel held and contained thirty-one and one-half gallons of beer, and that each fractional barrel contained its proportional part of a standard barrel, yet in truth and in fact each and all of said packages were short of the standard measurement to the extent of three to four gallons per barrel. It is further alleged that plaintiff had no knowledge of said shortage, but supposed and believed that it was receiving full standard measure until near the termination of its transactions with defendant, and was thus mistakenly induced to accept and pay for beer to an aggregate amount of \$56,600 without any deduction or discount for the shortage. According to plaintiff's computation the shortages in the two varieties of beer purchased were as follows: Four hundred and eighty-three and three-fourths barrels at \$4.75 per barrel, and three hundred and ninety-five and five-eighths barrels at \$5.75 per barrel, making at the price named, with added freight, a total overpayment of \$5,267.91. The prayer for recovery is limited to \$2,000. The defendant admits the sale of the beer to plaintiff, but denies the alleged shortage in the amount

delivered. It further alleges that plaintiff voluntarily accepted, retained, and used each and every shipment of said beer, and paid therefor from time to time to the amount named, without objection or protest, and is thereby now estopped to maintain this action. Trial was had to a jury, and verdict returned for plaintiff for the sum of \$2,108.67. From the judgment rendered thereon defendant appeals.

I. The first and chief insistence on part of appellant is that the evidence offered by plaintiff is insufficient to support a recovery. The testimony on which plaintiff

1. SALES:  
over-payment:  
recovery:  
evidence.

bases its claim is, in substance, as follows:

Early in the history of these dealings with defendant the plaintiff or some of the members of the firm discovered that the amount being secured from the sale of beer at retail was less than should have been realized under normal conditions, and were thereby led to mistrust the honesty or efficiency of their agents or barkeepers, but did not think to question or examine the capacity of the packages in which the beer was being delivered by defendant until in April, 1907, when a series of tests was made. Some forty or fifty empty packages were filled with water, using for that purpose a standard gallon or half gallon measure, and found to be uniformly short to the amount of about two gallons to each half barrel, the size of package in which nearly all of the beer was delivered. Tests were also made of the quarters and eighths, finding shortage in each instance, though the shortage in the smaller packages was not quite so marked as in the half barrels. Other witnesses, local saloon keepers, who had handled more or less of the beer purchased by plaintiff, testify to testing the packages at different times during the years 1904, 1905, and 1906, and claim to have found them uniformly short in practically the same proportion found by plaintiffs in their tests of 1907. Bartenders in the service of plaintiff say that no substan-

tial variation was apparent in the size of the packages of the same nominal capacity in which the beer was received during the years in question, but the same were apparently of uniform measurement. The process of manufacturing and testing as shown by the defendant also tends to show that all of the packages of the same denomination used in its branches are of substantially uniform capacity. On the part of defendant witnesses in charge and management of its business testify in effect that a very high degree of care and skill is exercised to insure the full standard capacity of its packages, and to keep the same at all times uniformly correct, and if they are to be credited, it is hardly conceivable that upon a fair test anything more than a merely nominal variation should be found, and quite impossible that a half barrel so made and standardized should exhibit a shortage of one and one-half to two gallons. That this conflict in the testimony presents a material issue of fact on which plaintiff was entitled to go to the jury we think there can be no reasonable doubt. There is direct and positive evidence as to a material shortage in the casks actually tested, and we think, if the direct evidence is to be believed, the inference is direct and fair, if not inevitable, that a similar shortage affected all the shipments. It was the best evidence obtainable under the circumstances. It is true, as counsel point out, that there are many things in the record which might justify the conclusion that the claim in suit is the product of an afterthought, and without merit, but the credibility of the witnesses was for the jury, and it is not our province to disturb the verdict on such grounds.

II. Exceptions taken to rulings of the court upon the introduction of testimony are pointed out; but, not being argued by counsel, we shall not take time for their discussion further than to say we find no prejudicial error in them.

It is further argued that cross-examination of one of

the plaintiff firm disclosed the fact that there is an unpaid balance of over \$2,000 due from plaintiff on its account

with defendant, which claim, counsel say,  
**2. INSTRUCTIONS.** is the subject of an action now pending in the federal court, and that plaintiff could in no event recover for shortage in so much of the beer as is represented by said unpaid amount. In our judgment the court's charge to the jury sufficiently guards the rights of defendant in this respect. If more specific instruction would have been proper, it was not requested.

No objection is made in the court to the instructions or to the measure of the plaintiff's recovery as there laid down, and we must treat them as stating the law of the case. We find no sufficient ground for reversing the judgment below, and the same is *affirmed*.

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W. C. DE LASHMUTT and W. L. DE LASHMUTT v. THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY and THE CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellants.

**Railroads: OBSTRUCTION OF SURFACE WATER: JOINT LIABILITY OF OWNER AND LESSEE.** It is the duty of a railroad company to construct and maintain a bridge over a stream or ditch constructed for the drainage of surface water so as not to obstruct the passage of water therein, and it is liable in damages to a land owner resulting from failure to do so; and the same duty and liability rests upon a lessee of the railroad; and, as both the lessor and lessee are liable for the proper construction and maintenance of a bridge they may be joined as defendants in the same action.

**Same: CONSTRUCTION AND MAINTENANCE OF BRIDGES: REASONABLE CARE.**  
**2** It is the duty of a railroad company or its lessee to exercise reasonable care in constructing and maintaining bridges that will permit the free flow of the volume of water that may be reasonably expected to occasionally occur from unusual rainfall, and the instruction in this case states the correct rule.

**Same: CONCURRENT NEGLIGENCE.** A railroad company is liable to a

- 3 land owner for the negligent construction of a bridge so as to obstruct the free passage of surface water flowing thereunder, although a ditch for carrying the water may also have been negligently constructed and may have contributed to the injury; the land owner not being responsible in any manner for the construction of the ditch.

**Same: INSTRUCTION.** In this action it appeared that the embank-

- 4 ment of the ditch gave way and permitted the water to flow over plaintiff's land. The court instructed that if the break in the embankment was caused by the faulty and defective construction of the drainage ditch, or by the faulty and defective construction of the embankment, or the careless and improper manner in caring for and maintaining the ditch or embankment, then and in either event it can not be said that the insufficiency of the water way at the bridge was the direct and proximate cause of the breaking of the embankment and plaintiff could not recover. *Held*, that the instruction sufficiently advised the jury that the railroad company was not liable if the break in the embankment was caused by the negligent construction of the ditch.

**Same: MEASURE OF DAMAGES.** The instruction that plaintiff was en-

- 5 titled to the reasonable market value of the crops destroyed by the flooding of his land, under the facts and circumstances shown, was proper.

**Pleading: AMENDMENT: DAMAGES.** The plaintiff in an action for

- 6 damages caused by the flooding of his land may amend his petition before verdict so as to increase the amount of damages claimed.

**Removal of causes.** Where the federal court has determined that a

- 7 cause is not removable from the state court and remands it the defendant is not entitled to a second order of removal, and therefore can not insist upon the postponement of the trial in order to prepare a petition for removal.

**Appeal: ABSTRACTS: AMENDMENT.** Where appellant's original ab-

- 8 stract did not contain the record, and it did not appear until the filing of appellant's argument that a part of the record containing the petition for removal of the cause and the orders with respect thereto would be necessary to a solution of the question presented on appeal, the appellee could amend his abstract by embodying therein the proceedings and orders for removal.

*Appeal from Mills District Court.*—HON. N. W. MAOY,  
Judge.



FRIDAY, MAY 13, 1910.

SUIT to recover damages alleged to have been caused by an insufficient waterway under one of appellants' bridges. There was a verdict and judgment for the plaintiffs. The defendants appeal. *Affirmed.*

*W. S. Lewis and W. E. Mitchell*, for appellants.

*C. E. Dean, Genung & Genung*, and *John Y. Stone*, for appellees.

SHERWIN, J.—In 1907 the plaintiffs, as partners, were engaged in farming a large tract of land, and they were damaged by water which passed onto a part of said land through a break in the west levee of the Pony Creek ditch. The Chicago, Burlington & Quincy Railroad Company is the owner of a north and south road that crosses the ditch in question on a steel girder bridge about sixty-six feet in length; the distance between the banks of the ditch at that point being fifty feet or more. The steel girders are about six and one-half feet wide, and at the time in question they extended below the top of the ditch levees from two to three feet. Where the defendants' road crosses it, the ditch is constructed practically east and west, but about a half a mile east of said point the ditch curves and runs almost directly north for some distance. In the evening of the 14th of July, 1907, there was a rainfall of three or three and one-half inches in that locality. The water filled the ditch so full that it overflowed the levees on both sides in many places, and broke through the west levee just north of the curve in the ditch of which we have spoken, doing the damage for which plaintiffs ask a recovery. The plaintiffs claim that the break in the levee was caused by the defendants' obstruction of the ditch with its bridge.

The question of a misjoinder of parties defendant was properly raised in the trial court, and both defendants now insist that they were improperly joined. While the Chicago, Burlington & Quincy Railroad Company was the owner of the road, it leased the same to the Chicago, Burlington & Quincy Railway Company in 1901, and the latter company operated it until the 30th day of June, 1907, when the lease was canceled and the possession and operation thereof was surrendered to the former company. It is therefore undisputed that on the 14th day of July, 1907, the railway company was not in possession of or operating the road, and based upon such fact the railway company contends that it is not liable for plaintiff's loss. The railroad company urges that it is not liable for the reason that the bridge in question was constructed and, until the surrender of its lease, was maintained by the railway company, and the railroad company had had no notice that it was an obstruction to the flow of water in the ditch. These three contentions of the appellants may properly be disposed of together.

Code, section 2039, provides as follows: "All the duties and liabilities imposed by law upon corporations owning or operating railways shall apply to all lessees or other persons owning or operating such railways as fully as if they were expressly named herein, and any action which may be brought or penalty enforced against any such corporation by virtue of any provisions of law may be brought or enforced against such lessees or other persons." It was the primary duty of the owner of the road to construct and maintain over the ditch a bridge that would not obstruct the passage of water, and, if it failed in either respect, it would be liable for damages occasioned by such failure. Hence, if the defendant railway company, as lessee, so constructed the bridge in question, or so maintained it, as to prevent the free flow

1. RAILROADS:  
obstruction  
of surface  
water: joint  
liability of  
owner and  
lessee.

of water down the ditch, it is liable under section 2039. The evidence is overwhelming that the girders of the bridge were so low that, when the ditch was well filled, they would catch the floating debris and dam the ditch for some distance east of the bridge. Their obstruction of the passage of the water also caused sediment to settle in the bottom of the ditch, thereby raising the same and correspondingly lessening the depth of channel. The bottom of the ditch at the bridge and east thereof had thus been raised long before the railway company surrendered its lease, and there seems no escape from the conclusion that it is liable under the statute.

As we have heretofore said, it was the duty of the owner of the road to construct and maintain bridges that would not obstruct the passage of water, either in a natural water course, or in a ditch authorized by law. The question then arises whether the leasing of the road, its properties, and its operation, relieves the owning company from liability for the faulty construction of bridges by its lessees, or from liability for the negligent maintenance of the same.

The appellant railroad company contends that since the statute (section 2066) authorized the lease of its road it is not liable for the negligent act of its lessee. But with this contention we can not agree. An early case deciding the question before us is *Washington, Alexandria & Georgetown Railroad Company v. Catherine Brown*, 17 Wall. 445 (21 L. Ed. 675), wherein Mr. Justice Davis, speaking for the court, said: "It is the accepted doctrine in this country that a railroad corporation can not escape the performance of any duty or obligation imposed by its charter or the general laws of the state by a voluntary surrender of its road into the hands of lessees. . . . The operation of the road by the lessees does not change the relations of the original company to the public." This rule seems to obtain generally in this country. See cases cited in

5 U. S. Dig. section 121. In 20 Am. & Eng. R. Cas. Ann. 847, the rule is laid down as follows: "A railroad company which has leased its road, cars, and engines, and allows the lessee company to operate the same, is liable to third persons or the public for the carelessness and negligence of the lessee and for defects in the construction and maintenance of the road and its equipment, unless there is a statutory provision to the contrary." A large number of cases are there cited in support of the rule thus stated, and, so far as we have examined them, they do support it. Some of the cases go to the length of holding that the lessor road is liable for injury to passengers and employees, but we need not go so far in this case. It seems to be the almost universal holding that the lessor corporation is liable for a breach of duty which it owed to the public, whether it is or is not liable for the omission of duties not falling within this classification. And it is also generally held, we think, that even where the statute authorizes the lease of a road, but contains no clause exempting the lessor from liability, the lessor still remains liable for an injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction and maintenance of its road, etc. *Lee v. Southern Pac. R. R. Co.*, 116 Cal. 97 (47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140); *Harden v. Railroad Co.*, 129 N. C. 354 (40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747), and authorities there cited. Our statute, while permitting a lease of the road, does not discharge the lessor company from any of its corporate liabilities. It merely imposes a liability on the lessee company while operating it. See *Bower v. Railway Co.*, 42 Iowa, 546. The lessor and lessee both being liable for the proper construction and maintenance of the bridge, there is a joint liability. *Bower v. Railroad Co.*, *supra*; *Railroad Co. v. Crane*, 113 U. S. 424, 5 Sup. Ct. 578, 28 L. Ed. 1064.

In the fourth instruction the jury was told that it was the duty of appellants to "provide passageways for the water reasonably sufficient to allow it to flow through without being diverted from its natural course or being banked up so as to cause damage to the property of another." It was further said, in the same instruction:

<sup>2</sup> SAME: construction and maintenance of bridges: reasonable care.

"It must anticipate and make provision for such floods as may occur in the ordinary course of nature. It must also foresee and provide for such unusual storms as may occasionally occur, whether they are called ordinary or extraordinary; but a railroad company in building and constructing its road, bridges, and culverts is not bound to provide for unprecedented floods, nor is it guilty of negligence in failing to provide for a flood which is not only extraordinary, but unprecedented, and could not reasonably have been foreseen." This instruction does not in our opinion place a greater burden of care on the railroad company than the law requires. It means simply that reasonable care shall be exercised to provide bridges that will permit the free flow of the volume of water that may reasonably be expected at times, and such is undoubtedly the rule. *Houghtaling v. Railroad Co.*, 117 Iowa, 540; *Vyse v. Railroad Co.*, 126 Iowa, 90; *Blunck v. Railroad Co.*, 142 Iowa, 146. In requiring the railroad company to foresee and provide for such unusual storms "as may occasionally occur," the instruction required no higher degree of care than would be exercised by a reasonably careful man, and the meaning of the language was so carefully circumscribed by that part of the instruction relating to extraordinary and unprecedented floods that the jury could not have misunderstood its scope.

In the sixth instruction the court told the jury that if it found that the flood of July 14 was not extraordinary and unprecedented, but did find that the bridge in question had not sufficient water space thereunder to ac-

commodate the flow of water in said ditch at all times except in times of extraordinary and unprecedented floods, it would be justified in finding the defendants guilty of negligence substantially as charged. This instruction is complained of because it made no mention of the defense that the overflow in question was caused by the defective plan and construction of the ditch. The evidence would not have warranted or sustained a finding that the bridge was not itself an obstruction to the free flow of the water that might reasonably be expected to pass through the ditch at times, and conceding that there was evidence justifying the submission of the question of the negligent plan and construction thereof, the instruction was right, because the plaintiffs were not to blame for the faults of the ditch, and if the negligence of the appellants concurred with the negligence of the builders of the ditch, they were still liable for damages. *Vyse v. Railroad Co., supra; Langhammer v. City*, 99 Iowa, 295.

3. SAME:  
concurrent  
negligence.

But, aside from the above consideration, the jury was told in the same instruction, in substance, that the question of the appellants' liability depended upon its determination of the other questions thereafter submitted to it, and in the seventh instruction

4. SAME:  
instruction.

this language was used: "If you find that the break in the levee was caused by the faulty and defective construction of the drainage ditch, or by the faulty and defective construction of the levee in question, or by the careless and improper manner in caring for and maintaining the said ditch or levee, then, in either of such events, it can not be said that the insufficiency of the waterway at the bridge in question was the direct and proximate cause of the breaking of the levee at the point complained of, and in that event the plaintiffs can not recover, and your verdict should be for the defendants." The same thought was again embodied in the eighth and ninth instructions

with so much force and clearness that the jury could not have misunderstood the matter.

Instructions six, seven, eight, and nine are not, in our judgment, so misleading and inconsistent as to warrant criticism. We think they presented material issues in a plain and concise manner.

There is much evidence tending to show that the plaintiff's injury was caused by the condition of the appellants' bridge, and that the flood in question was not an extraordinary or unprecedented one. The plaintiffs asked for damages to their growing crops of corn and hay, and the court instructed that they were entitled to their fair and reasonable market value as shown by all the facts and circumstances. The instruction gave the correct rule for this case. *Blunck v. Railroad Co.*, *supra*; *Harvey v. Railroad Co.*, 129 Iowa, 465; *Sutherland on Damages*, sections 1023-1049; *Jefferis v. Railroad Co.*, 147 Iowa, 124. There was no error, therefore, in receiving testimony as to value of such crops.

Plaintiffs were permitted to amend before verdict increasing the amount of their claim. There was no error in the ruling. Nor was there error in not requiring the plaintiffs to elect which of the defendants they would pursue, nor in overruling the railroad company's motion to dismiss. Both of these points are covered by the first division of this opinion.

The original petition was in two counts. The first count asked for \$1,920 damages, and the second, which was based on the same facts, asked for \$1,920 actual damages, and for double damages in the sum of \$3,840. After the evidence was practically all in, the plaintiffs amended the prayer of the second count by asking judgment for \$2,642 actual damages, withdrawing all other prayers and dismissing the first count of their petition. The defendant railroad company thereupon filed a motion to strike this amend-

5. SAME: measure of damages.

6. PLEADING: amendment: damages.

ment, as we have already said, and in connection therewith, and subject thereto, it also asked that the trial be postponed "until such time as the defendant . . . may prepare a petition for removal and bond therefor," asking that the cause be removed to the federal court of Council Bluffs, Iowa. The court refused to grant the time asked, and the appellant railroad company complains thereof.

The original petition was filed on the 26th day of March, 1908, and on the 14th day of April, 1908, the railroad company filed its petition and bond asking an

7. REMOVAL OF  
CAUSES.

order of removal from the district court of Iowa to the federal court of Iowa. This petition was based on the allegation that the defendant was a citizen of the state of Illinois, and that it was improperly joined with the railway company. The case was ordered removed to the Circuit Court of the United States, and was thereafter duly taken to said court, where, after a hearing, it was remanded to the district court of Iowa. There was thus an adjudication by a court with jurisdiction that the case was not removable to the federal court, notwithstanding the amount of plaintiff's claim, and hence the appellant railroad company had no right to a second order of removal nor to a postponement of the trial for the purpose of petitioning therefor.

The proceedings for a removal to the federal court and the orders made therein are embodied in an amendment to the appellee's additional abstract. This amend-

8. APPEAL:  
abstracts:  
amendment.

ment the appellant moves to strike. The motion is overruled. The original abstract did not present the record, and not until appellants' argument was filed did it appear to the appellee that the record would be necessary to a full understanding of the situation. The petition for removal and the orders removing the case and remanding it to the district court are part of the record of the district court which may properly be brought before this court. The verdict



and judgment have ample support in the evidence, and we find no error for which there should be a reversal.

The judgment is therefore *affirmed*.

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STATE OF IOWA V. CHARLES DEAN, Appellant.

**Change of venue: PASSION AND PREJUDICE: DISCRETION: EVIDENCE.**

- 1 Where the evidence in support and in resistance of a motion for change of venue, on the ground of passion and prejudice, presents a substantial conflict, the action of the trial court in overruling the motion will not be disturbed. In this action the evidence in support of a change consisting of newspaper comments is held insufficient to incite a disregard of the proper administration of the law, either on the part of the judge or jury.

**Criminal law: FORCIBLE DEFILEMENT: ELECTION OF OFFENSES.**

- 2 In prosecutions for rape the state may be required to elect which of two or more acts it will rely upon; but under an indictment for forcible defilement, the gist of the offense lies in obtaining unlawful control over the person of prosecutrix, and by means of the force, menace or duress thus exercised accomplish her defilement, which need not necessarily be the result of force. So that all the acts of defilement during the continuance of the duress constitute one continuous transaction, and can be proven under one indictment.

**Evidence: STATEMENTS OF WITNESS ON FORMER TRIAL: HOW PROVEN.**

- 3 The statute providing that a reporter's notes or a transcript thereof shall be admissible as a deposition for the purpose of proving the testimony of a witness on a former trial, does not exclude the evidence of one who heard and remembered such testimony, on the ground that the reporter's record is the best evidence.

**Criminal law: EVIDENCE: STATEMENTS OF A CONFEDERATE.**

- 4 The statements of one engaged with defendant in the commission of a crime may be shown as against defendant, although made in his temporary absence.

**Same: INCLUDED OFFENSES: INSTRUCTIONS.**

- 5 Where the evidence is such that there would be no justification for conviction of an included offense should the jury fail to find defendant guilty of the principal crime charged, failure to instruct on the subject of included offenses is not erroneous.

**Same: PREVIOUS CHASTE CHARACTER: INSTRUCTION.** Where the court  
6 in a prosecution for forcible defilement told the jury to consider the evidence of previous chaste character of prosecutrix, on the questions of unlawful taking against her will and whether she was actually defiled, failure to specifically instruct on the question of whether she consented to the intercourse was not erroneous.

**Same: CAUTIONARY INSTRUCTIONS: PREJUDICE.** An instruction that  
7 the jury should not by their verdict lessen the protection the law throws around the innocent and virtuous female, nor in any degree disregard the legal rights of defendant, was not prejudicial as assuming that prosecutrix was innocent and virtuous.

*Appeal from Marion District Court.*—HON. J. H. APPLE-  
GATE, Judge.

THURSDAY, JUNE 9, 1910.

DEFENDANT was convicted under an indictment charging him and one Van Gorkum jointly with forcible defilement committed upon one Josephine Muilenburg, and from this conviction he appeals. *Affirmed.*

*Hays & Amos*, for appellant.

*H. W. Byers*, Attorney-General, and *Charles W. Lyon*, Assistant Attorney-General, for the State.

McCLAIN, J.—I. The trial court overruled a motion for change in the place of trial to another county predicated upon a showing that at the December term, 1908, of the district court of Marion County, this defendant and Van Gorkum were indicted for the crime of rape committed upon this prosecutrix, and at the February term following Van Gorkum was tried and convicted of assault and battery; that the case as against this defendant was continued until the April term following; that in the meantime defendant was indicted for the offense of public

lewdness, this indictment being also continued to the April term; that at the April term the present indictment was returned against defendant and Van Gorkum, charging forcible defilement, and the indictment for rape was then dismissed; that this defendant was at said April term tried under this indictment for forcible defilement, and a verdict of guilty was returned against him, which was afterwards set aside by the trial court, whereupon his case was continued to the September term following, at which he was tried and convicted, the trial commencing on the 19th of October; that during and immediately following the trial of Van Gorkum in February, which resulted in his conviction for assault, the two newspapers published in the county seat called attention to the sensational nature of the charges against Van Gorkum and this defendant, and referred to the conviction of Van Gorkum for assault instead of rape as an outrageous perversion of justice, and they made sarcastic references to the insignificance of the punishment which could be imposed for the wrong done, the revolting nature of the acts which were testified to by Van Gorkum, and this defendant as a witness for him, being freely commented upon; that the same subject matter was again referred to by these newspapers after the conviction of this defendant in May, and the setting aside of the conviction by the trial court on a motion for new trial based upon alleged errors of law in the exclusion of certain testimony offered for the defendant; that the same newspapers had in the meantime commented upon two crimes against women committed in Ottumwa, drawing inferences therefrom to the discredit of criminal procedure in our courts; and that in general these publications had indicated an excited state of feeling on the part of the public in Marion County with reference to the failure to adequately punish Van Gorkum and this defendant for the criminal transaction with which they were charged to have been connected.

In support of defendant's motion, which was filed September 28, an affidavit was presented, signed by nine residents of the county, stating that in their judgment there was such a state of excitement or prejudice caused by the publication of damaging and vilifying articles and editorials, together with public discussions, that defendant could not have a fair and impartial trial in said county. In a resistance to this motion, the county attorney stated facts tending to show that the publications referred to could not have reached any considerable portion of the electors of the county; that the affiants, whose statements were relied upon for the defendant, lived in the town of Pella and the immediate vicinity thereof, and did not give a fair expression of the feeling existing in the minds of the people of the body of the county; and that any prejudice which may have existed against the defendant among the electors of the county at large by reason of the publications complained of had died out by virtue of the lapse of time since they had been made. In support of this resistance, affidavits were presented, made by six residents of different townships in the county, to the effect that in their belief there was not such excitement and prejudice in the county as would prevent the procuring of a jury which would be entirely fair and impartial toward defendant.

Now, we may concede that the newspaper comments were unfair toward the jury which returned a verdict of assault only against Van Gorkum, and to the court which set aside the conviction of this defendant for errors of law committed on his trial, and we may concede further that the criticism on the courts in general with reference to the procedure in criminal cases was unwarranted and unfortunate in its tendency to bring the proceedings of our courts in general into disrepute. But we find nothing in the articles tending to incite a disregard of law on the

1. CHANGE OF  
VENUE: passion  
and prejudice:  
discretion:  
evidence.

part of the community, nor likely to cause a judge or jury to depart from their sworn duty in the administration of law in the case of this defendant. The showing in this case is quite similar to that commented upon in the cases of *State v. Icenbice*, 126 Iowa, 16, and *State v. Brown*, 130 Iowa, 57, in each of which this court refused to interfere with the discretion exercised by the trial court in overruling a motion for a change of place of trial. The general rule recognized in these cases and in the more recent case of *State v. Hoffman*, 134 Iowa, 587, that where there is a substantial conflict as to the existence of passion and prejudice likely to affect the result of the trial, the discretion of the lower court in overruling a motion for a change will not be interfered with on appeal, is too well established to require the citation of further authorities.

It is true that in *State v. Crafton*, 89 Iowa, 109, there was a reversal on the ground that under the showing made in that case as to sensational statements against the defendant in the newspapers immediately after the alleged commission of the crime, a change of venue should have been granted. But in the case before us the trial of Van Gorkum as to which the most serious complaints were made was had in February, the first trial of this defendant was held in May, and the motion for change was not made until just preceding the trial in October at which defendant was convicted. If there had been an application for change of place of trial or for continuance in May on account of the alleged prejudice in the county, the showing would have been more persuasive and entitled to more serious consideration; but it was certainly for the trial court to say, under the circumstances as shown to him in October, whether any prejudice that may have existed against defendant such as would probably prevent his having a fair trial had not so far subsided as that an unbiased jury could be secured, and there is not the slightest showing that the jury which did finally convict him was influ-

enced in any way by passion or prejudice. Under the circumstances of the case, we are well satisfied that the ruling of the trial court should not be interfered with.

II. The evidence for the prosecution tended to show that on the evening of October 8, 1908, in the town of Pella, this defendant and Van Gorkum, who was jointly indicted with him, took the prosecuting witness against her will into a buggy and, preventing her from escaping, drove a mile or two into the country, where they took her into a field, and, by means of mutual assistance of each other in restraining her voluntary actions, they each had intercourse with her; that, returning with her in the buggy, they took her to the lodging room of one Visser and kept her there in restraint all night, where each of them and also Visser himself had intercourse with her; and that she did not escape from Visser's room until afternoon of the next day. At the time of the commission of these acts the prosecuting witness was a girl under seventeen years of age, but over the age of consent.

At the close of the evidence for the prosecution the defendant moved the court to require an election on the part of the state as to whether it would rely for conviction on the evidence relating to the intercourse had in the country or on the intercourse had in Visser's room, and defendant now complains of the action of the court in overruling this motion. If the prosecution had been for rape, the duty of the state to elect which transaction was relied upon would have been plain. *State v. King*, 117 Iowa, 484. And it is insisted for defendant that the offenses of forcible defilement and rape are kindred offenses, and that the same rule should be applied to each. The statutory definition of "forcible defilement" is found in Code, section 4757, which provides that: "If any person take any woman unlawfully and against her will, and by force, menace or duress compels her to marry him or

2. CRIMINAL  
LAW: forcible  
defilement;  
election of  
offenses.

any other person, or to be defiled, he shall be fined not exceeding one thousand dollars, and imprisoned in the penitentiary not exceeding ten years." The offense here described differs from that of rape, in that, if the woman is taken against her will, subsequent intercourse with her constitutes a crime, although there is not the resistance to the consummation of the act which is essential in rape. The statute seems to be intended to cover cases where persuasion or artifice is employed to obtain control over a woman for the purpose of having intercourse with her, although the object is finally accomplished without the immediate use of force. *Beyer v. People*, 86 N. Y. 369; *Schnicker v. People*, 88 N. Y. 192; *State v. Fernald*, 88 Iowa, 553; *Pollard v. State*, 2 Iowa, 567. The gist of the offense is the taking of the woman unlawfully and against her will and defiling her by means of force, menace, or duress thus exercised, and it differs therefore from rape, which involves only a violation of her person by force. This difference, as we think, clearly indicates that all the acts of defilement during the continuance of the duress following the unlawful taking are elements of one continuous criminal transaction, and may be proven under one indictment.

If two indictments had been found against this defendant for forcible defilement of the prosecutrix, one of them based on the intercourse had in the country, and the other on the intercourse had in Visser's room, we think that a conviction or acquittal under one of them would have been a bar to a trial under the other, if it appeared that the duress exercised by the defendant over the prosecutrix was continuous and covered both acts of intercourse. Cases cited from other states in behalf of appellant to support his contention that the prosecution should have been limited to reliance upon one act of intercourse as a ground for conviction are in the main of rape or seduction, which we think are not in point. Our attention

has not been called to any case in which the very question here under consideration has been discussed. We reach the conclusion, therefore, that the court did not err in refusing to require the prosecution to elect on which of the two acts of intercourse it relied to sustain a conviction.

III. As tending to furnish the corroborative evidence of the connection of the defendant with the commission of the crime which is required by statute, the

prosecution introduced a witness who, over the objection of defendant, was allowed to testify that he was in the courtroom during the trial of Van Gorkum, already referred

to, and that on such trial this defendant testified to his own act of having intercourse with the prosecuting witness in the country, and in Visser's room. Counsel for defendant concede the competency of such testimony as establishing an admission on the part of defendant furnishing the necessary corroboration, but contend that, as the testimony of this witness given in that connection was taken down in shorthand, the shorthand notes of such testimony or the translation thereof by the reporter would constitute the best or primary evidence as to what such testimony was, and that a witness who heard the testimony should not have been allowed to detail it. Counsel rely upon the statutory provision that the shorthand notes or a transcript thereof shall be admissible as a deposition for the purpose of proving what the testimony of a witness was on a former trial as excluding the evidence of one who was present and heard such testimony. The provision relied upon is as follows: "The original shorthand notes of the evidence, or any part thereof, heretofore or hereafter taken upon the trial of any cause or proceeding, in any court of record of this state, by the shorthand reporter of such court, or any transcript thereof, duly certified by such reporter, when material and competent, shall be admissible in evidence on any retrial of the case

3. EVIDENCE:  
statements of  
witness on  
former trial:  
how proven.



or proceeding in which the same were taken, and for purposes of impeachment in any case, and shall have the same force and effect as a deposition, subject to the same objections so far as applicable." Code Supp. sec. 245a. We see nothing in the language of the statute to indicate an intention that this method of proof shall exclude the oral testimony of a witness who heard the evidence as to what it was. Prior to the enactment of this statutory provision, this court held that the shorthand reporter's notes of the testimony of a witness on another trial were not the best evidence in such sense that one who heard and remembered the former testimony might not testify as to what it was. *State v. Mushrush*, 97 Iowa, 444. Cases from other states cited by counsel, holding that the sworn statements or testimony of a witness on a coroner's inquest or a preliminary examination, which statements are required by statute to be signed by the witness, constitute the best evidence of what such statements or testimony was, and that parol evidence thereof is inadmissible as secondary, are not in point, for the provision that the statement or testimony shall be signed by the witness is evidently intended to give to such statement or testimony added weight by enabling the witness to correct his statements before signing if he shall find that the minutes are not a proper embodiment of what he desires his statement or testimony to be. See *State v. Prater*, 26 S. C. 198, 613 (2 S. E. 108); *Powell v. State* (Miss.), 23 South. 266. The case of *People v. Gardner*, 98 Cal. 127 (32 Pac. 880), which is also relied upon, relates to a statutory provision wholly different from that here involved, and throws no light upon the question now before us. We reach the conclusion that evidence as to the statements of a witness on a former trial which would have been competent prior to the enactment of the statutory provision above quoted are not rendered incompetent by that provision. It is conceded by counsel that if the testimony as to what this defendant

said on the trial of Van Gorkum was admissible, it furnished the corroborating evidence required by the statute to take the case to the jury, and nothing further on the subject of corroboration need be said.

IV. It appears that when defendant and Van Gorkum brought the prosecuting witness back from the country in the buggy they took her to the foot of the stairway leading to Visser's room, where Van Gorkum took the prosecutrix out of the buggy and pushed her up the stairway, while defendant drove away, and objection was made to the introduction of evidence as to what the prosecutrix said to Van Gorkum and what Van Gorkum did in defendant's absence. But it appears that defendant was absent only a short time and returned before Van Gorkum and prosecutrix had reached the top of the stairs, and that his absence was accounted for by the necessity of making some disposition of the horse and buggy. On defendant's return he assisted in forcing prosecutrix to go to Visser's room, and the evidence leaves not the slightest doubt that Van Gorkum's acts in the meantime were in pursuance of a common plan on the part of defendant and Van Gorkum. What was said and done during defendant's absence was a part of the continuous transaction, and the evidence was properly admitted as against this defendant. The theory of counsel seems to be that only where a conspiracy is charged in the indictment can evidence be admitted as to the conduct of one conspirator in the absence of the other. Plainly the question is not whether a conspiracy is charged, but whether the act of one of those engaged in a common enterprise may be shown as against the other, and, as we understand it, this may always be done where the act is in pursuance of a general plan. Here the proof of the conspiracy such as to charge defendant with the acts of Van Gorkum in carrying out their common purpose was ample, and plainly there was no error in allow-

4. CRIMINAL LAW:  
evidence: state-  
ments of a  
confederate.

ing the state to show what Van Gorkum did in pursuance of that common plan during the brief absence of defendant. *State v. Walker*, 124 Iowa, 414.

V. The trial court instructed the jury that the crime charged included the offense of assault and battery and simple assault, but further instructed that under the evidence the jury would not be justified in finding defendant guilty of either of said lower degrees of crime, and that they should either find the defendant guilty of the crime of forcible defilement or return a verdict of not guilty. This court has repeatedly held that if under the evidence there would be no justification for a conviction of an included offense should the jury fail to find the defendant guilty of the principal offense charged, it is not error to fail to instruct the jury as to included offenses. *State v. Reasby*, 100 Iowa, 231; *State v. Cater*, 100 Iowa, 501; *State v. Atkins*, 122 Iowa, 161; *State v. Sherman*, 106 Iowa, 684; *State v. King*, 117 Iowa, 484; *State v. Stevens*, 133 Iowa, 684.

VI. Evidence was introduced for defendant tending to show that the prosecutrix was reputed in the community to be unchaste before the commission of the alleged crime by defendant, and the jury was instructed to take into account her reputation for chastity as bearing upon her credibility as a witness, and also as bearing upon the question whether or not she was in fact unlawfully taken against her will by the defendant and by him defiled by means of force, menace, or duress. But the jury was also told that it was not essential that the state establish the previous chaste character of the prosecutrix. The complaint made of this instruction is that it does not specifically state to the jury that such evidence should be construed as bearing upon the question whether prosecutrix consented to the intercourse. But the court did in another portion of the instruction direct the jury to take such evidence

5. SAME:  
included  
offenses:  
instructions.

6. SAME:  
previous chaste  
character:  
instruction.

into account in determining whether prosecutrix was in fact unlawfully taken and against her will, and also whether she was in fact defiled; and, as it was unnecessary to prove that the intercourse was against her will, we think the court gave to the defendant all the benefit of the testimony in regard to the reputation of the prosecuting witness for unchastity to which he was entitled.

VII. In another instruction, cautionary in its nature, the jurors were told that they should not by their verdict "lessen the protection the law wisely designs to throw around the innocent and virtuous female,"

7. SAME: around the innocent and virtuous female,"  
cautionary nor "in any degree disregard the legal rights  
instructions: of the defendant as they are explained in  
prejudice. these instructions." The objection made to this instruc-  
tion is that it assumes prosecutrix to have been "an inno-  
cent and virtuous female." We think the instruction  
capable of no such construction. The object of the prose-  
cution was not to protect the prosecutrix individually, but  
to protect women in general, most of whom are innocent  
and virtuous, against such atrocious and revolting conduct  
as that charged to the defendant, and no possible prejudice  
could have resulted to defendant from the use of this  
language.

VIII. Some complaint is made as to the definition of the crime charged as given by the court; but, without setting out the instruction at length, it is sufficient to say that we find therein no error of which the defendant can complain.

The judgment of the trial court is *affirmed*.

THE LANE-MOORE LUMBER CO. and THE CITIZENS' LUMBER Co., Appellants, v. S. C. BRADFORD ET AL., Appellees.

**Fraudulent conveyances:** TRANSACTIONS BETWEEN HUSBAND AND WIFE:

1 EVIDENCE. A debtor will not be permitted to use the name of his wife as a mere cover to conceal his own property; but in the instant case, involving the rights of a third party, the evidence is reviewed and held to show that the arrangement by which the wife acquired certain property was not a fraud upon the husband's pre-existing creditors, nor a sham as between husband and wife, and that the wife's right to the property could not be subjected to the payment of the husband's pre-existing debts,

**Same:** RIGHTS OF HUSBAND'S CREDITORS. The evidence in this action

2 also disclosed that the husband transferred certain notes and mortgages to a creditor as collateral, and that subsequently his mortgagor transferred the property to him in satisfaction of the mortgage and he conveyed the same to his creditor as further collateral security. Thereafter it was agreed that the wife should convey to such creditor certain of her property as collateral and receive therefor from the creditor the notes and mortgages previously transferred to it by her husband, and a quitclaim deed to the property covered thereby, which was done. The property conveyed by the wife to the creditor was subject to a mortgage which was released by the mortgagee, and the notes and mortgages which the wife received from the creditor were accepted by him in lieu thereof. *Held*, that the wife did not acquire an absolute title by the quitclaim deed from the husband's creditor but that the same amounted to a mortgage only, and that as the conveyance of her land to the creditor was as security only for the debt of her husband she was entitled to hold the quitclaim deed as security against loss by reason of her conveyance to secure the husband's debt, and that the husband's creditors were entitled, subject to her right, to subject his equitable interest in the property to the satisfaction of their claims.

**Taxation of costs:** DISCRETION. Where the court, in an action to

3 cancel conveyances and to subject property to the lien of a judgment, granted the plaintiff partial relief, there was no reversible

error in taxing all the costs against the defendant, although the court in its discretion might have apportioned the costs.

*Appeal from Buena Vista District Court.*—HON. D. F. COYLE, Judge.

WEDNESDAY, JUNE 15, 1910.

CREDITOR's bill to set aside conveyance and to subject property to the lien of plaintiffs' judgments. There was a decree granting partial relief and denying other relief. Plaintiffs appeal. Defendants also have taken a cross-appeal. *Affirmed* on both appeals.

*Edson & Moulton*, for appellants.

*James De Land and Faville & Whitney*, for appellees.

EVANS, J.—Defendants S. C. Bradford and Catherine Bradford are husband and wife. The defendants Brenton and the Bank of Dallas Center may be deemed as identical for the purpose of this case; Brenton being one of the owners of the bank. The business involved in this inquiry was transacted for the bank by Brenton. For convenience of discussion of this feature of the case we shall use Brenton's name alone. It is urged in argument by defendants' counsel that there is not sufficient evidence of the insolvency of S. C. Bradford to sustain a creditor's bill. We dispose of this contention first as preliminary to any further statement of the case. To our minds such contention is too heroic. The insolvency of Bradford is a mountain peak in the case, and is visible from every point. Our discussion of the case will therefore be based upon the assumption of the insolvency of Bradford. Plaintiffs are judgment creditors of S. C. Bradford alone, and their claims accrued long prior to any of the transactions here

considered. The record in the case covers an inquiry into a large number of transactions, and the case is exceedingly complicated in its details. The real controversy in the case arises over questions of fact, and this not so much over any conflict in the evidence as over the ultimate conclusions of fact to be drawn from the evidence. The case in all of its complications has been set forth with commendable clearness in the arguments of respective counsel, and we have therefore had little difficulty in getting a clear comprehension of the various branches of the case. It would be impossible, however, for us to enter into a satisfactory discussion of the facts in the case without extending our opinion to an undue length, and we shall do little more than to state our conclusions upon the different features of the case which have been presented for our consideration.

I. Some time in 1907 certain negotiations were had between the defendants, the Bradfords, and Brenton. Bradford was at that time insolvent and had been so for some

time prior thereto. Prior to this time he had been the owner of a farm, known in the record as "Grass Lake Farm," consisting of one thousand two hundred acres. He

1. FRAUDULENT  
CONVEYANCES:  
transactions  
between hus-  
band and wife:  
evidence.

had held a contract for its purchase for some years from Lot Thomas. The contract matured in 1905, and Bradford was unable to perform. An arrangement was entered into, however, whereby Thomas conveyed to Mrs. Bradford, and mortgages for the purchase money were executed by her as the owner thereof. The interest on these mortgages was allowed to become delinquent, and a foreclosure sale thereof was had, and the time of redemption had nearly expired when an arrangement was entered into with Brenton whereby he negotiated mortgage loans on such property of \$60,000. Later a \$10,000 mortgage was executed on the same property as a third mortgage. The legal title to this property continued in Mrs. Bradford

up to the time of the beginning of this suit, when she conveyed it back to her husband subject to the mortgages, and disclaimed any beneficiary interest therein. Some time following the negotiation of the mortgage loans above referred to, some negotiations were had between the same parties with reference to future transactions in the purchase and sale of real estate. Bradford had some knowledge and experience along that line. He desired to purchase real estate, but had neither funds nor credit. Brenton refused to loan funds to Bradford for that purpose because of his insolvency, but signified his willingness to make proper loans to Mrs. Bradford from time to time as occasion might arise. The arrangement was verbal and indefinite and informal, but it was assented to by Mrs. Bradford and her husband. Pursuant thereto, many tracts of real estate were purchased mostly by executory contract drawn in the name of Mrs. Bradford as purchaser. The money necessary for the performance of these contracts was loaned by Brenton upon notes executed by Mrs. Bradford and secured in all cases by an assignment of the contract to him or by a conveyance of the property. The actual business relating to such purchases was transacted by Bradford as purported agent for his wife, acting upon the most general authority as such agent. The judgment and experience of the husband furnished the main reliance of the wife in all of such transactions. Sales of many tracts were made largely in the form of trades for stocks of merchandise. For the purpose of handling these stocks of merchandise, a corporation was organized with a capital of \$10,000. The necessary working capital was advanced by Brenton, \$8,300 worth of the stock was issued to Mrs. Bradford, and by her pledged to Brenton as collateral for moneys advanced. Bradford contributed no property to any of these enterprises, except that he contributed about \$700 in value to the capital stock of the corporation, for which stock was issued to him



and to one of his creditors; and except, further, that he transferred to his wife a certain contract or option which he held for four hundred and sixty-one acres of land. This contract was entirely executory, and nothing had been paid thereon, nor had there been any increase in the value of the land at the time it was transferred to his wife.

At the time of the trial Mrs. Bradford purported to be the equitable owner of several tracts of land purchased in pursuance of the arrangement above stated, all of which, however, were incumbered by her obligations to pay the purchase money under the contracts of purchase, and further incumbered by her obligations to Brenton for moneys advanced in partial performance of the contracts. At the time of the trial Brenton held her personal notes for more than \$20,000 independent of the notes which she had executed in the negotiation of loans upon the Grass Lake farm. Whether the enterprise so entered into had in it any final margin of profit over and above the current expenditures that had already been expended does not appear from the testimony. The contention of the plaintiffs is that Bradford is the real owner, and that the use of the name of his wife was a mere sham to cover the property from his creditors, and reliance is placed upon those cases wherein the courts have frequently held that a debtor will not be permitted to use the name of his wife as a mere cover for concealing his own property. *Hamill v. Augustine*, 81 Iowa, 302. We have no disposition to relax such rule; but the arrangement under consideration here was not simply an arrangement between husband and wife. It involved a third party in its inception. Brenton was clearly within his rights in refusing to advance money to an insolvent, and in refusing to accept mortgages on real estate from such insolvent. He was within his legal rights in entering into such negotiations with the wife of the insolvent. It necessarily follows that she could legally incur the liability and acquire the property rights which

should arise out of such an arrangement. The arrangement was not a present fraud upon pre-existing creditors. Nor can we characterize the transaction as a sham as between husband and wife in view of the fact that the wife could borrow the money from Brenton, and her husband could not. It is true she had no property of her own upon which to base her credit, but she was not insolvent, and Brenton could deal with her without the peril of complication arising from judgment liens or other claims such as existed against her husband. Our conclusion is that as to all the newly acquired property for all of which she obligated herself personally the plaintiffs as pre-existing judgment creditors have no ground of complaint. *Shircliffe v. Casebeer*, 122 Iowa, 618; *Foreman v. Bank*, 128 Iowa, 661; *King v. Wells*, 106 Iowa, 649.

II. For some years prior to 1907 defendant S. C. Bradford was indebted to the German Savings Bank in amounts varying between \$10,000 and \$20,000. He be-

came the owner of certain notes and mortgage for \$10,000, which are referred to in the record as the Stevens and Herrick mortgage. He transferred these notes and mortgage to the German Savings Bank as collateral for his debt. The mortgage covered certain town lots in Storm Lake. Later Stevens and Herrick conveyed the lots to Bradford, and, as between them, the conveyance was intended to be in satisfaction of the mortgage as a part of the consideration. Stevens and Herrick executed and delivered to him a deed, leaving the name of the grantee therein blank. For the purpose of improving his collateral security with the German Savings Bank he conveyed the lots to the German Savings Bank. The mutual intent of that conveyance was that it should be held by the savings bank as the equivalent of the mortgage and as collateral security for the debt above mentioned. The form of the conveyance consisted in inserting the name of one Voss, an officer of the bank,

2. SAME:  
rights of  
husband's  
creditors.

as grantee in the blank space of the deed which he had received from Stevens and Herrick. Later the bank became dissatisfied with its security. Mrs. Bradford was the owner, under an executory contract, of a certain farm in Dickinson County. Negotiations were entered into for a substitution of collateral security. The substance of such negotiations was that Mrs. Bradford should convey the Dickinson County farm to the savings bank as collateral security for her husband's debt, and that the savings bank should transfer to her the previous security held by it, viz., the Stevens and Herrick notes and mortgage, and another mortgage on other town lots. In order that Mrs. Bradford could convey the Dickinson County land to the savings bank, she had to negotiate with Brenton, who held the contract for the land as security for his advancements. The negotiations as entered into and carried out were that Brenton advanced sufficient money to be paid on the contract to enable Mrs. Bradford to obtain a deed from the seller. A certain mortgage loan was negotiated thereon, and the land was then conveyed by Mrs. Bradford to the savings bank, subject thereto. Brenton relinquished his claim therein, and, in lieu thereof, received from Mrs. Bradford the Stevens and Herrick notes and mortgage which she received from the savings bank. The transfer by the savings bank to Mrs. Bradford of its previous securities included not only a formal transfer of the notes and mortgage, but a quitclaim deed of the lots from Voss to Mrs. Bradford. Under this arrangement Mrs. Bradford claims to be the equitable owner of the lots in question, subject to the claim of Brenton thereon as security for her indebtedness to him.

On behalf of plaintiffs, it is contended that the debts secured by the Stevens and Herrick mortgage had been paid as a result of the sale of the lots, and that the mortgage was therefore dead and that Mrs. Bradford took nothing. So far as the mere form of the various transac-

tions is concerned, there is legal ground for plaintiffs' contention. But equity deals with the substance rather than with the form of the transaction, and there is little trouble at this point in ascertaining the substance and intent of these successive transactions, and in determining the equitable rights of the parties. As between Stevens and Herrick on the one hand and S. C. Bradford on the other, the debt should be deemed paid. But, as to the German Savings Bank, which held the paper, it was not paid, nor was the personal liability of Stevens and Herrick extinguished. Inasmuch, therefore, as the paper had life in the hands of the savings bank, we see no reason why it might not be transferred to Mrs. Bradford in pursuance of the proposed exchange of securities already noted. By such transfer her rights are equal to those of the savings bank, and no more. The trial court held that she did not thereby acquire an absolute title to the lots by her quitclaim deed, but that such deed was only the equivalent of the mortgage. It also held that inasmuch as her conveyance of the Dickinson County farm was a conveyance as security only for the debt of her husband, she was entitled to hold her mortgage and deed of the lots in question only as indemnity against loss by reason of the conveyance which she had made to secure her husband's debt, and that, subject to such right, her husband was the equitable owner of the lots. Both parties complain of this holding. The defendants' claim at this point has already been indicated. The plaintiffs' complaint has been partly indicated.

Plaintiffs complain, further, that the court should have fixed a limit to the interest or claim of Mrs. Bradford to these lots, and that such limit should have been \$2,000. The argument is that the farm conveyed by her was worth only \$8,000 when it was conveyed, and that it was incumbered by mortgage for \$5,000, leaving her an equity of \$3,000, and that she has since had a benefit of

\$1,000 arising in some manner out of the sale of property. It is argued, therefore, that \$2,000 will be her utmost loss if her land is finally appropriated to the payment of her husband's debt. The fallacy of this argument is that her ultimate loss is to be measured, not by value of the land as it was when it was conveyed, but by its value as it shall be when it is appropriated. The land may increase in value. If the land shall be finally appropriated to the payment of the debt and if at that time it should be worth \$20,000, her right to indemnity could not be confined to the mere value of her original equity at the time of the conveyance, but must be measured by the larger value. It is our conclusion that the trial court was right in its holding at this point. What we have already said applies equally to the controversy over the \$2,300 mortgage which covers certain other sixteen lots. The legal title to these lots, however, is conceded to be in S. C. Bradford.

III. Defendants complain on their appeal because the trial court taxed all costs to them. As we have already seen, the trial court awarded to the plaintiffs partial re-

3. TAXATION  
OF COSTS:  
discretion.

lief. It was sufficient to carry costs unless the case was a proper one for an apportionment of costs. Under the record in this case there was no hard and fast rule for the taxation of costs applicable. The court had some latitude of discretion. If an apportionment had been ordered we could have found no fault with such order. Nor can we say that there was an abuse of discretion in allowing the costs to follow the partial relief granted. We think the decree is right in all its parts, and it is accordingly affirmed on both appeals. *Affirmed.*

J. E. HELGESON, Appellee, v. E. B. HIGLEY COMPANY,  
Appellant.

**Master and servant:** INJURY TO SERVANT: EVIDENCE. Where it appeared that an injury to an employee might as well have happened from some cause for which the master was not responsible as from a cause for which he was liable, a question of negligence on the master's part was not made out; as where an employee was injured by the sudden starting of a freight elevator from which he was unloading goods, and the evidence failed to disclose the cause of its starting, but could be attributed to the act of plaintiff as properly as to the act of the coemployee. The evidence is held insufficient to support a finding that defendant's general manager in charge of the business started the elevator without giving the required warning.

**Same:** WARNING: NEGLIGENCE OF FELLOW SERVANT. Where the master has promulgated the necessary rules about giving employees warning and has instructed all employees to do so, this duty rests upon all of the employees alike; and a failure of one employee engaged in the same common service to perform this duty, which is the only negligence charged, is not chargeable to the master, even though he was of a higher grade than the fellow servant who was injured.

**Assumption of risk:** SUBMISSION OF ISSUE. Where the issue of assumption of risk is tendered by the pleadings and there is evidence to support it the question should be submitted to the jury; but in the instant case failure to submit the issue was not of itself reversible error.

*Appeal from Cerro Gordo District Court.*—HON. C. H. KELLEY, Judge.

THURSDAY, JUNE 16, 1910.

ACTION at law to recover damages for personal injuries received by plaintiff while attempting to operate a freight elevator in a building owned and operated by de-

fendant. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. *Reversed.*

*Hewitt, Miller & Wallingford* and *C. Woodbridge*,  
for appellant.

*Blythe, Markley, Rule & Smith* and *Senneff & Bliss*,  
for appellee.

DEEMER, C. J.—Defendant is a corporation operating a cold storage warehouse in the city of Mason City. For the purpose of carrying goods and produce from one story to another in this building, it had installed a freight elevator, which was operated by electric power. No system of bells or signals was provided, but it promulgated a rule among its employees to the effect that before any of them should move the elevator they must call up or down the shaft to warn other employees of the proposed movement. The case as made by the petition is that plaintiff was employed by defendant on or about November 22, 1906, to work about the warehouse, and;

That the defendant employed and had in charge of the management of said business a superintendent or manager, and that on, to wit, the 1st day of December, 1906, the plaintiff was ordered and directed by the said defendant through its superintendent to use and operate said elevator in and about his employment and for the purpose of carrying and conveying certain produce from the basement of said building upward to other floors thereof; that while this plaintiff was carrying out the directions of the defendant and unloading produce from said elevator in the basement, and while said plaintiff was in the exercise of due care on his part, he inserted his hand, arm, and a portion of his body over the floor of said elevator as he was required to do under the direction of the defendant, in the performance of his duties, and under the direction of the defendant, through its superintendent, the said defendant through its superintendent negligently,

carelessly, and without regard to its duties owing this plaintiff moved or caused to be moved the said elevator suddenly and without warning to the plaintiff, and in violation to the rules which required call to be made to plaintiff; that the said elevator so moved or caused to be moved by the defendant through its superintendent moved violently and rapidly upward while he so had his hand, arm, and a portion of his body inserted over the floor of said elevator; that said elevator was so drawn upward through the elevator shaft, and plaintiff's hand and arm were caught between the floor of said elevator and the side of said elevator shaft, whereby his arm was mangled, crushed, and torn, and he was thereupon violently thrown upon the floor of said basement.

Other allegations of negligence were made, but this was the only one submitted to the jury. Defendant's answer was a general denial and a plea of assumption of risk. The trial court did not submit the issue of assumption of risk, but submitted the case wholly upon the question of whether O'Keefe, defendant's superintendent, started the elevator without giving any warning, as stated in the petition from which we have quoted. The jury was also properly instructed upon the issue of contributory negligence.

This appeal presents but two matters which will be considered. One is the sufficiency of the testimony to show that O'Keefe started the elevator, and the other the liability of the defendant for the negligence of O'Keefe in the event it be found that he started the elevator without warning. The testimony shows that O'Keefe was defendant's general manager, and had charge of the business at the warehouse when the accident occurred, and it also shows that he properly promulgated rules with reference to giving warning before any of the employees should attempt to move the elevator. It is claimed, however, that he himself violated the rules and started the elevator with-

1. MASTER AND  
SERVANT:  
injury to  
servant:  
evidence.



out giving any warning, thus causing the injury of which plaintiff complains. There is no direct testimony as to what started the elevator to move. Plaintiff testified that he did not do it, and O'Keefe was equally positive that he did not. In the building at the time were Griffith, defendant's engineer, and E. B. Higley, president of defendant company, in addition to plaintiff and O'Keefe, and it is not claimed that either Griffith or Higley started the elevator. Plaintiff testified as follows:

I gave a signal by calling into the elevator shaft twice, "elevator down." After that I reached for the rope or cable to start the elevator. When the elevator started up I had not touched the rope. I did not pull any rope there at all. When the elevator started up it is pretty hard to say how rapidly it did go. I tried to get out of it to escape from being caught. It caught my arm just below the elbow between the top of the casing and the door entering into the elevator shaft and the floor of the elevator. I should judge that the floor of the elevator was somewhere about between three and four feet from the floor of the basement where I was standing. The door that leads into the elevator shaft was somewhere from five and one-half to six feet high. . . . After the accident I was coming up the stairs out of the basement. I saw Pete Burke and Mr. Higley. . . . Mr. O'Keefe wanted to know how it happened, and I told him that I was going to use the elevator, and I had hollered for it, and that I reached in and was going to pull the rope and let it down, but that before I got that far somebody else pulled and it went up and caught me. . . . The first rope was probably somewhere around a foot or a foot and a half from the door. The other ropes would be a little further to the other way. I intended to reach for the rope furthest away. . . . The front cable, the one nearest the door, starts the elevator up. It was my intention to start the elevator down. I did not reach or touch any of the ropes there. I did not think there was any way by which that elevator could move up or down unless somebody had moved the ropes. . . . I worked at the plant continuously every day from November 22 until the day I was injured. Dur-

ing my employment I used the elevator quite often. One day I made as many as a dozen trips. A good deal of the time someone was with me. Sometimes I went up alone. I started and stopped it on those occasions. When there was some of the other boys that was working there with me on the elevator I always let them operate it. I could see how they did it. . . . In attempting to reach in there at the time I had my right hand and arm inside. I tried to look in and I saw the ropes. I saw where I was directing my hand. I got my arm in there beyond the elbow. I think the floor of the elevator at that time was probably three to four feet above the floor. The elevator started after I got my hand in there. I had occasion to use this elevator the first day I entered defendant's employ. The man that was working with me did the signaling. He hollered "elevator up" when we started, and then we went up. As we started down he said "elevator down." Mr. O'Keefe told me the first day I was there that that was the way they managed the thing. He told me if I wanted to use the elevator to go down to holler out good and loud. As I used the elevator during those ten days I observed that custom right along.

As already stated, O'Keefe and the other men present stated emphatically that they did not start the elevator. No one seems to know just what caused the elevator to start; and under the issues and the instructions the jury was bound to find that O'Keefe was the man who did it. The only justification for such a finding is a presumption that someone must have started it, and that as O'Keefe was at a place where he might have started it, he is the man who did it, although it is conceded that plaintiff himself was more nearly in a position to start it than anyone else. The doctrine of *res ipsa loquitur* does not apply to the case, and the trial court did not submit the issue on that theory. As the accident may as well have happened from some cause for which defendant was not responsible as from a cause for which it was liable, the mere starting of the elevator affords no proof of defendant's negligence. We are constrained to hold that plaintiff did

not make out a case on the theory in which it was presented to the jury. *Rhines v. Railroad*, 75 Iowa, 597; *Neal v. Railroad*, 129 Iowa, 5; *O'Connor v. Railroad*, 129 Iowa, 636; *Ashbach v. Railroad*, 74 Iowa, 248; *Thayer v. Coal Co.*, 121 Iowa, 121; *Bell v. Clarion*, 113 Iowa, 126.

Moreover, even if the jury had been justified in finding that O'Keefe started the elevator without giving warning, his negligence in so doing was not that of the defendant, the master, but of a servant who at the time was engaged in the same common employment with the plaintiff. The

2. SAME: warn-  
ing: negli-  
gence of fel-  
low servant.

fact that this fellow servant was of a higher grade than plaintiff does not change the rule. In starting the elevator without giving warning O'Keefe was not performing a masterial duty. *Barnicle v. Connor*, 110 Iowa, 238; *Scott v. Chicago G. W. R. R.*, 113 Iowa, 384; *McQueeny v. Ry. Co.*, 120 Iowa, 522; *Wilder v. G. W. Cereal Co.*, 134 Iowa, 451. Defendant had promulgated the necessary rules about giving warning, and had instructed all its employees to do so, and no greater duty of giving warning was imposed upon O'Keefe than upon any other employee who should attempt to use the elevator. O'Keefe was not defendant's *alter ego* in attempting to use the elevator even if he did start it. He was under a like, but no greater, duty to give warning, and his failure to give it can no more be charged to defendant than if some other employee had been guilty of the same neglect. His failure to do so was simply his own negligence for which under well-settled rules of law defendant is not responsible. It is not a case where defendant furnished an unsafe place to work. The place was safe, and only became unsafe when an employee with proper instructions failed to give warning, and did not then become unsafe to everyone in the building, but only to the one who was about to use the elevator. It differs materially from mining cases where

high explosives are used which makes the place unsafe to all who may be in the mine unless warning is actually given. In such cases the duty to actually give warning is held to be masterial, as in *Hendrickson v. Gypsum Co.*, 133 Iowa, 89; *Jacobson v. Gypsum Co.*, 144 Iowa, 1; *Beresford v. Coal Co.*, 124 Iowa, 34, and other like cases.

Should we hold the master liable for failure to give warning in this case, nothing would remain of the well-established rule, often announced by this court, that for the negligence of a fellow servant the master is not liable. Here we must assume there was no defect in the elevator, no lack of a proper number of efficient servants, no failure to promulgate proper rules, no negligence in failing to instruct plaintiff as to dangers, no failure to provide a reasonably safe place to work, and sufficient appliances. The only negligence charged and submitted was the failure of a servant to give warning and comply with the rules before starting the elevator. This was clearly the negligence of a fellow servant, for which defendant can not be held responsible.

II. We are also constrained to hold that the issue of assumption of risk should under the pleadings and the testimony have been submitted to the jury, although we should not for this reason have reversed the case. The issue was tendered, and there was evidence to support it, and we think the matter should have been submitted to the jury.

For the errors pointed out, the judgment must be, and it is, *reversed*.

3. ASSUMPTION  
OF RISK:  
submission  
of issue.

BANKERS' LIFE ASSOCIATION V. T. E. ENGELSON ET AL.,  
and N. C. NELSON, JOEL BOLEY, Appellants, v. T.  
E. ENGELSON ET AL., CLAUDE E. WILSON, and E.  
M. LASELL.

**Mortgages: HOMESTEAD: FORECLOSURE AND SALE.** Where the home-  
1 stead and other property is included in the same mortgage, the  
mortgagor on foreclosure may insist on a sale of the other prop-  
erty before resort is had to the homestead.

**Same: SALE OF HOMESTEAD.** Where a senior mortgage includes a  
2 homestead and other property, and a junior mortgage covers the  
other property only, the junior mortgagee can not compel the  
senior mortgagee to resort first to a sale of the homestead for  
the satisfaction of his mortgage; so that a decree foreclosing  
the mortgages which directed that the homestead should not  
be sold except for a deficiency remaining after subjecting the  
other property to the payment of the senior mortgage was proper.

**Same.** Under such circumstances the junior mortgagee, as between  
3 himself and the mortgagor, is a mere creditor as to the home-  
stead, and the mortgagor can convey the homestead free from  
any claim under the junior mortgage, and the purchaser will  
hold it free from liability, except such as it was subject to in  
the hands of the mortgagor.

**Same: HOMESTEAD: LIABILITIES OF PURCHASER.** A decree foreclosing  
4 both mortgages under such circumstances and providing for the  
apportionment of the proceeds between the mortgagees, which  
directs that the homestead shall not be sold except for a defi-  
ciency remaining upon the senior mortgage after a sale of the  
property other than the homestead, fixes the liability of the sev-  
eral tracts, and a subsequent purchaser of the homestead may  
rely upon such decree as fixing the obligation which he assumed  
in purchasing the homestead subject to the mortgages.

*Appeal from Winnebago District Court.*—HON. J. J.  
CLARK, Judge.

THURSDAY, JUNE 16, 1910.

THE first of these cases as originally instituted was an action to foreclose a mortgage on two hundred and eighty acres of land described as three tracts, one of one hundred and sixty acres, another of eighty acres, and a third of forty acres. In this action there was a cross-petition asking a foreclosure of a second mortgage on the same land. The second action was to foreclose a mortgage covering the one hundred and sixty-acre tract and the eighty-acre tract. It being made to appear to the court that the forty-acre tract was the homestead of Betsy Engelson, wife of the principal defendant, who had joined in the execution of the mortgages, the two cases were consolidated in order that the proceeds of the sale of land might be properly apportioned among the respective lienholders, and a decree was entered providing for such apportionment and directing that the homestead be not sold save for any deficiency after subjecting the other property to the payment of liens existing against such other property, which also covered the homestead. This decree provided for special execution, and such execution was issued on March 3, 1909. Before a return of this execution, Betsy Engelson, in whom was then the legal title as well as the homestead right in the forty-acre tract, conveyed the same by warranty deed to Lasell subject to the mortgages which had been liens thereon; whereupon Nelson, Wilson, and Boley, who held liens by foreclosure on the other two tracts subordinate to the mortgage liens on the three tracts, filed a supplemental petition asking that the decree be so modified that the forty-acre tract which had formerly been Betsy Engelson's homestead be subjected first to the satisfaction of the mortgages covering the three tracts, and that the two tracts on which the petitioners had liens subordinate to the liens of the mortgages on the three tracts be subjected to the payment of such prior mortgages only to the extent necessary to satisfy such mortgages after the forty-acre tract had been fully

applied to their satisfaction. Lasell, the grantee from Mrs. Engelson of the forty-acre tract, demurred to this supplemental petition, and his demurrer was sustained, whereupon the supplemental petitioners appealed. *Affirmed.*

*C. H. Tenney, T. A. Kingland, and Oliver Gorden,* for appellants *N. C. Nelson, Claud Wilson, and Joel Boley.*

*H. A. Brown,* for appellees.

McCLAIN, J.—From the foregoing statement, which recites only such facts as are deemed essential to an understanding of the question of law raised on this appeal, it is apparent that appellants, holding liens under foreclosure on two of the three tracts, such liens being subordinate to other liens under foreclosure on the three tracts, are seeking to take advantage of the conveyance by Mrs. Engelson to Lasell of the homestead tract by having the burden of the two prior liens thrown primarily on that tract in order that the surplus in the proceeds from the other two tracts may be saved to them; their theory being that by the sale of the forty-acre tract Mrs. Engelson lost her homestead right therein, and that the tract thereupon became equally liable with the other two tracts to the satisfaction of the senior liens, and that for the protection of appellants' junior liens which were upon the two tracts only the forty-acre tract should be first applied to the satisfaction of the superior liens.

It is practically conceded by counsel for appellees that if the forty-acre tract had not been the homestead of Mrs. Engelson at the time the original decree was entered, that decree should have provided for the subjection of the property to the various liens in the method now contended for by appellants; that is, the forty-acre tract should have been subjected first to the satisfaction of the superior liens

in order that so much as possible of the proceeds of the sale of the other two tracts might be saved for the satisfaction of the liens of appellants on those two tracts. But the contention for appellees is that, in view of the existence of the homestead right in the forty-acre tract at the time the original decree was entered, such decree was proper under the provisions of Code, section 2976, that the homestead be subjected to the payment of mortgage liens thereon only to the extent of the deficiency remaining after subjecting to the payment of such liens all other property covered by such mortgages, and that a conveyance of the homestead forty to Lasell after the rendition of the decree and the issuance of the special execution thereunder, even though it amounted to an abandonment of her homestead right in said forty by Mrs. Engelson, did not entitle the appellants to a modification of the decree.

No authorities have been presented by counsel on either side directly involving the question now submitted. Counsel for appellants rely upon the cases of *Barker v. Rollins*, 30 Iowa, 412; *Kemerer v. Bournes*, 53 Iowa, 172, and *Dilger v. Palmer*, 60 Iowa, 117, as by implication sustaining their position. But an examination of these cases will show that they fall far short of sustaining the position contended for. In *Barker v. Rollins*, the sole question seems to have been whether Coggeshall, who purchased the mortgaged premises, was entitled by virtue of his homestead right in a portion thereof on cross-petition to have the mortgagee required to resort to other property of the mortgagor not exempt from execution before resorting to the homestead in satisfaction of his mortgage, and it is to be noticed in passing that Coggeshall claimed a homestead right in the entire mortgaged premises. The court held that Coggeshall's homestead right could not be set up as a basis for requiring the mortgagee to resort to other property of the mortgagor before subjecting the mortgaged property in which Coggeshall's homestead was



claimed. It is to be noticed that Coggeshall was not claiming any right as the grantee of the homestead of Rollins, much less was he claiming that he had acquired the homestead right of Rollins after the rendition of a decree in which it had been specially provided that such homestead should be subjected to the payment of the mortgage indebtedness only after other property of Rollins had been subjected to its satisfaction. We can not see that the situation of Coggeshall in that case and of Lasell in the case before us are in any way analogous. In *Kemerer v. Bournes* it was held that a purchaser of mortgaged premises from the mortgagor who assumed payment of the mortgage does not by making the purchased premises his homestead pending proceedings for the foreclosure of the mortgage, acquire any such homestead interest as against the mortgage as to make it necessary that his wife shall be made a party to the foreclosure proceeding in order to cut off her homestead right. This case is so clearly without bearing on the present controversy that comment thereon is unnecessary. In *Dilger v. Palmer* it was held that where the mortgagor before foreclosure conveys to another that portion of the mortgaged property not included within his homestead he can not insist that the portion of the property thus conveyed be first subjected in the hands of the purchaser to the payment of the mortgage indebtedness. This case plainly has no application to the question now under discussion.

Before these appellants acquired their mortgage liens on the two tracts, the mortgagor holding the forty-acre tract as a homestead was entitled to insist that on foreclosure of the two existing mortgages each covering the homestead tract with the other property, such other property be first exhausted before resorting to the homestead tract. Under this situation the appellants were not entitled to insist that for their protection the burden of the two prior mortgages be first thrown upon the homestead.

*Equitable Life Ins. Co. v. Gleason*, 62 Iowa, 277; *Bissell v. Bissell*, 120 Iowa, 127. A mortgagor may convey a homestead to a mortgagee who has a lien on both the homestead and other property without giving to a junior lienholder on such other property the right to have the senior mortgage first satisfied out of the homestead. *Linscott v. Lamart*, 46 Iowa, 312.

As between these appellants and Mrs. Engelson, the appellants were creditors only so far as the homestead tract was concerned, and she might convey the homestead free from any claims of such creditors. *Richards v. Orr*, 118 Iowa, 724; *Citizens' Sav. Bk. v. Glick*, 134 Iowa, 323; *Lutz v. Ristine*, 136 Iowa, 684. We are unable to see, therefore, how appellants can have any better right by reason of the conveyance of the homestead by Mrs. Engelson to Lasell to require the satisfaction of the prior mortgages first out of the homestead than they would have had while the homestead belonged to Mrs. Engelson. In one sense the homestead right is personal, and of course Mrs. Engelson could not transfer her homestead right to Lasell. But we think she could transfer the homestead forty as to which appellants had no claim whatever to Lasell without subjecting it in his hands to any greater liability than that to which it was subjected in her own hands.

There is another consideration in support of our conclusion which seems to us quite controlling. Before the conveyance of the homestead forty by Mrs. Engelson to Lasell, the measure of liability of that tract had been fixed by the decree of which appellants made no complaint. We think it would be most inequitable to subject that forty in the hands of Lasell holding under the conveyance from Mrs. Engelson to a greater charge than that imposed upon it by the decree. That decree fixed the liability of the different tracts, and we think Lasell had a right to rely upon it as the measure of the obligation which he assumed in purchasing it subject to the mortgages standing against

it which had already been foreclosed and established by the decree. We need not now determine what the effect of the abandonment of the homestead by Mrs. Engelson after the decree and before the sale would have been, nor whether these appellants in such an event would have been entitled to a modification of the decree. So long as the forty-acre tract remained her homestead, she held it subject to no other liability than that fixed by the decree, and subject to this liability only she was entitled to convey it to Lasell without creating any rights in favor of appellants which they did not already have.

We are satisfied with the decree of the trial court, and it is *affirmed*.

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**MARY C. SARGENT v. MODERN BROTHERHOOD OF AMERICA,**  
Appellant.

**Fraternal insurance: ACTION UPON POLICY: DEFENSES: STATUTES.**

- 1 Code, section 1812, providing that where the examining physician for an insurance company or association reports upon an applicant that he is a good physical risk, the company is thereby estopped from defending an action on the policy on the ground that the applicant was not in the required condition of health at the time of its issuance, unless such report was procured by the fraud or deceit of the applicant, has no relation to fraternal beneficiary societies, orders or associations.

In the instant case the pleadings and proof show defendant to be a fraternal beneficiary society and therefore exempt from the provisions of the statute.

**Same: FALSE STATEMENTS: BREACH OF WARRANTY.** Where an appli-

- 2 cation for membership in a fraternal beneficiary society contains representations which are untrue, the society, under a provision of the certificate that if the application or any part of the same contains untruthful statements the certificate shall be void, may rely on any such false statements as breaches of warranty.

**Same: BURDEN OF PROOF.** The burden of proof is upon a fraternal

- 3 insurance society seeking to show the falsity of the answers of an applicant for membership.

**Evidence: AFFIRMATIVE AND NEGATIVE TESTIMONY.** The testimony of  
 4 an examining physician that he had no recollection of calling upon the applicant professionally previous to the examination, or that his attention was called to that fact at the time of the examination, was not sufficient, in view of the fact that he had made many other examinations for defendant and other fraternal orders, to overcome the specific testimony of another witness as to what was said to him and by him at the time.

**Fraternal insurance: MISREPRESENTATIONS: WARRANTIES.** A beneficial society may by its contract make a misrepresentation in an  
 5 application for membership a warranty in the sense that a false statement will render the contract void, although the inquiry in response to which the statement is made is not as to a matter strictly material to the risk, and the death of the member did not result from any of the matters as to which the false statements were made.

**Same: INTERPRETATION OF LANGUAGE USED.** In the interpretation  
 6 of the language used in the questions propounded and the answers thereto of an applicant for fraternal insurance, a reasonable and even liberal construction will be adopted in favor of the member, so as to avoid a forfeiture on technical grounds.

**Same: FALSE STATEMENTS: SUFFICIENCY OF PROOF.** The statement of  
 7 an applicant for beneficial insurance that he was in good health is not shown to be false by proof of temporary ailment not of so serious a character as, according to common understanding, would be called a disease. Thus in this case proof that the applicant had temporarily suffered from throat and stomach trouble, and had suffered occasional headaches from temporary causes, was not sufficient to establish as false the representation of applicant that she had not previously been afflicted by disease; although there was a specific inquiry as to habitual headache which was answered in the negative.

**Same.** An applicant for beneficial insurance is not required to disclose the occasion and circumstances of every consultation with a physician for temporary indisposition not amounting to disease; and a statement that the applicant had not been attended by a physician was not shown to be false because of proof that she had consulted a physician for temporary ailments.

**Same: ESTOPPEL.** Where an applicant informed the examining physician of a fraternal society, at the time of taking his application, concerning the applicant's last attendance by a physician and the nature of his ailment, and was informed that it was not necessary to disclose that matter, he was relieved from any imputation of falsity in failing to disclose the facts.

*Appeal from Hardin District Court.*—HON. C. G. LEE,  
Judge.

SATURDAY, JULY 9, 1910.

ACTION to recover a death benefit under a certificate of membership of Lulu N. Sargent in the defendant association, which benefit was made payable to this plaintiff, the mother of said member. The proceeding was in equity, and the court decreed that plaintiff was entitled to participate in the mortuary fund of the association to the amount of one full assessment on all members in good standing, not to exceed \$1,000. The defendant appeals.—*Affirmed.*

*Blythe, Markley, Rule & Smith and Ward & Williams,*  
for appellant.

*Lundy & Wood,* for appellee.

MCCLAIN, J.—The defense to this action is predicated on alleged false statements contained in the application for membership, and the questions argued are: First, whether, in the absence of proof of fraud, false statements constituted a defense; and, second, whether the alleged misstatements were in fact false.

I. It appears that the application on which the certificate of membership was issued, consisted to a considerable extent of answers of the applicant to questions propounded by defendant's regular examining physician, Doctor Guthman, who wrote down the answers and certified at the end of the examination that he considered the applicant a good physical risk. It is one of the contentions of appellee that this report of the examining physician that the applicant was a fit subject for insurance estopped the defendant from setting up in defense of this action on the

1. FRATERNAL  
INSURANCE:  
action upon  
policy: de-  
fenses: stat-  
utes.

certificate that the assured was not in the condition of health required by the policy at the time of the issuance of the certificate, in the absence of any evidence that the certificate was procured by or through the fraud or deceit of the assured. See Code, section 1812. *Brown v. Modern Woodmen*, 115 Iowa, 450; *Ley v. Metropolitan L. Ins. Co.*, 120 Iowa, 203.

The contention for appellant is, in this respect, that the statutory provision just referred to, found in the chapter of the Code relating to life insurance companies and associations, has no relation to fraternal beneficiary societies, orders, or associations, which are specifically governed by another chapter of the Code and exempted from the provisions of statutes relating to life insurance companies, except as specified in the latter chapter. If the defendant is a beneficiary society or association, and not a life insurance company or association, then the provisions of Code, section 1812, have no application to this case. *Smith v. Supreme Lodge*, 123 Iowa, 676.

The allegations of the petition are that "defendant is an association organized under the laws of the state of Iowa as an insurance company and fraternity for the purpose of insuring the lives of its members, as indicated by Exhibit A hereto attached." And it is admitted in the answer "that the defendant is a corporation organized under the laws of the state of Iowa relating to fraternal and beneficiary associations." This is the only admission as to the character of the defendant association, and by general denial of all allegations of the petition not admitted, any allegation of the petition inconsistent with this admission is denied. There is also a specific allegation that the defendant is a fraternal beneficiary association organized under the chapter of the Code relating to such associations.

By way of stipulation it was agreed on the trial that the certificate set out as an exhibit to the petition was

executed by the defendant on the application, which was introduced in evidence and made part of the record, and that another exhibit incorporated in the record was a copy of the articles of incorporation of the defendant society, under which it was organized and transacted business. The certificate recites that it entitles the applicant to membership in said fraternity, and that such certificate, together with the articles of incorporation, by-laws, and regulations of the society, constitute express warranties, conditions, and agreements as between the defendant and said member. The application refers to the applicant as proposed for membership in the defendant, and the articles of incorporation expressly recite that the incorporators associate themselves together as a body corporate for the purpose of organizing a fraternal beneficiary society under the statutes providing for the organization of such societies.

Under the allegations of the pleadings and the stipulations on the trial, it is clear that the defendant is a fraternal beneficiary society, order or association, and not a life insurance company or association, and, therefore, that the provisions of Code, section 1812, above referred to, do not apply to it. The allegations and the proof clearly distinguish this case from the cases relied upon by the appellant. See *Stork v. Supreme Lodge*, 113 Iowa, 724; *Brown v. Modern Woodmen*, 115 Iowa, 450; *Krause v. Modern Woodmen*, 133 Iowa, 199.

In the case last cited it appears that the character of the defendant corporation as a life insurance society under the averment in the petition that it was a life insurance and beneficiary society was not put in issue, and there was no specific proof as to its character. We have no occasion therefore to determine the effect of Code, section 1812, as applied to this case; and if the application contains specific representations which are shown to have been untrue, then the defendant may rely upon them as breaches of warranty,

2. SAME: false  
statements:  
breach of  
warranty.

rendering the certificate void under the provision found in the certificate, that if said application or any part thereof shall be found untrue, then the certificate shall be null and void and of no effect.

II. The misstatements relied upon by appellant, as constituting breaches of warranty rendering the certificate void, are found in the answers of the applicant to questions by the physician; the answers being written by the regular examining physician for the defendant, and the application as thus filled out being signed by the applicant and warranted to be true. So far as relied upon for the appellant these questions and answers were as follows:

Question 4. Have you ever had any of the following diseases: (a) Habitual headache? Answer. No.

Question 5. Have you ever had any other disease or surgical operation? Answer. No.

Question 9. When and by what physician were you last attended and for what complaint? Answer. Never have been sick.

Question 14. Have you had during the last seven years any disease or severe sickness? Answer. No.

Question 22H. Is your menstruation regular and normal? Answer. Yes.

We can not set out all the evidence relating to the truth or falsity of these answers. But bearing in mind that the burden of proof was on the defendant to show the

answers to be false, we find that the most  
 3. SAME: burden of proof. that can be claimed for the evidence is that it shows: (1) That the applicant had been afflicted with headaches, sometimes as often as once in two weeks, but not so often in the last few years of her life; (2) that in January, 1907 (the certificate was issued in August, 1907, and her death occurred in October following), the applicant had had an attack of sore throat, tonsilitis or quinsy which had been of a temporary character, from which she recovered in two or three days, having had one call from



a physician on that account, and that in the latter part of June and the first part of July in the same year she had had a rather severe attack of gastritis which was brought on by the eating of strawberries and cream, and during which she was twice called on by a physician for purposes of treatment, and further that a slight attack of stomach trouble had occurred in August for which she once called upon a physician, this attack having no apparent reference to or connection with the attack in June and July; (3) that when she was asked by the examiner about the last attendance by a physician his attention was called to the fact that he was the physician who had attended her in August for stomach trouble of the same character as that for which a Dr. Jones had treated her in June and July, and that the examiner said that those little things didn't count; that the question related to some serious sickness, such as typhoid; and (4) that while on one or two occasions the applicant had missed her regular periods of menstruation, she had been regular in this respect for some time prior to the examination.

It is true that the examiner, as a witness, testified that he had no recollection of attending the applicant in August, nor of his attention being called to the matter by the applicant or her mother when the questions were being answered. But in view of his admission that he had made many examinations of applicants for membership in this and other fraternal orders, his general denial of recollection is hardly sufficient to overcome the specific testimony of the mother of the applicant as to what was said to him and by him at the time the application was filled out. The testimony of the physician who attended the insured during her last illness indicates that she died as the result of an irregular form of typhoid fever or possibly a tubercular condition simulating it, called miliary or general tuberculosis.

4. EVIDENCE:  
affirmative  
and negative  
testimony.

It must be conceded that, in the absence of any restriction found in the statute, and we find none in the statutes applicable to fraternal beneficiary societies, a misrepresentation may by the terms of the contract be made a warranty in such sense that a false statement will render the contract void, although the injury in response to which the statement is made is not as to a matter strictly material to the individual risk and the death did not result from any of the matters as to which there was a false statement. In other words, an insuring association may select the terms on which it will enter into contracts of insurance, and may insist that the contract is void if such terms are not complied with. The cases relied upon for appellant are of this character, and need not be further considered in view of the concession which we are now making.

But in the interpretation of the language used in calling for answers and in making response to such inquiries, the courts insist upon a reasonable or even a liberal construction in favor of the assured, with a view to avoiding forfeitures on purely technical grounds. As is said in the case of

5. FRATERNAL  
INSURANCE:  
misrepresenta-  
tions: warran-  
ties.  
6. SAME: inter-  
pretation of  
language used.

*Wilkinson v. Connecticut Mutual L. Ins. Co.*, 30 Iowa, 119, 127, relating to the failure to disclose in answer to a question about previous accidental injuries a slight injury which the jury specifically found not to be serious: "The language of the question is to have a reasonable construction in view of the purposes for which the question was asked. It must have reference to such an accidental injury as probably would or might possibly have influenced subsequent health or longevity of the insured. It could not refer, and could not be understood by any person reading the question for a personal answer to refer, to a small burn upon the hand or arm during infancy, to a cut upon the thumb or finger in youth, to a stumble or falling or sprain of a joint in more advanced age. The idea is that

such a construction is to be put by the courts upon the language as an ordinary person of common understanding would put upon it when addressed to him for answer." The courts, in all jurisdictions, so far as we can discover, have applied this general principle of interpretation in determining whether an answer to a question is false.

Thus, it has been held that a statement that the applicant is in good health is not shown to be false by proof of a temporary ailment, not indicating a vice in the constitution or so serious as to have some bearing on the general health and continuance of health; that is, such as according to common understanding, would be called a disease. *Sieverts v. National Ben. Ass'n*, 95 Iowa, 710; *Meyer v. Fidelity & Cas. Co.*, 96 Iowa, 378; *Cushman v. United States L. Ins Co.*, 70 N. Y. 72; *Insurance Co. v. Trefz*, 104 U. S. 197 (26 L. Ed. 708); *Connecticut Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250 (5 Sup. Ct. 119, 28 L. Ed. 708); *Life Ins. Co. v. Francisco*, 17 Wall. 672 (21 L. Ed. 698); *Blumenthal v. Berkshire L. Ins. Co.*, 134 Mich. 216 (96 N. W. 17, 104 Am. St. Rep. 604); *Plumb v. Penn. Mut. Ins. Co.*, 108 Mich. 94 (65 N. W. 611); *Hann v. National Union*, 97 Mich. 513 (56 N. W. 834, 37 Am. St. Rep. 365); *Franklin Life Ins. Co. v. Galligan*, 71 Ark. 295 (73 S. W. 102, 100 Am. St. Rep. 73); *Billings v. Metropolitan L. Ins. Co.*, 70 Vt. 477 (41 Atl. 516); *Rand v. Life Assur. Soc.*, 97 Tenn. 291 (37 S. W. 7). Even where the inquiry is as to a specific ailment or disease it is to be interpreted as calling for an answer only where the previous attack was of a nature likely to result in impairment of health or to indicate a constitutional difficulty which might shorten life. *Rupert v. Supreme Court U. O. F.*, 94 Minn. 293 (102 N. W. 715); *Northwestern Mut. L. Ins. Co. v. Heimann*, 93 Ind. 24; *Mutual Ben. L. Ins. Co. v. Daviess' Ex'r*, 87 Ky. 541 (9 S. W. 812). Accordingly, this court

7. SAME: false statements: sufficiency of proof.

had held a negative answer as to "spitting or coughing of blood" was not false, unless the evidence showed that the applicant had been subject to spitting or coughing of blood in such sense as that a reasonable person might suppose some ill health or physical condition, affecting the desirability of the applicant as a risk, was indicated. *Peterson v. Des Moines L. Ass'n*, 115 Iowa, 668.

Giving to the questions and answers in this case relating to previous disease or severe sickness the interpretation thus indicated, it is clear that the evidence did not show any falsity in the statements. The tonsilitis or quinsy was not of a character to be denominated a disease, and the stomach trouble appears to have been of a similarly inconsequential character. Headaches due to temporary causes, not indicating or resulting in constitutional impairment, are not regarded as matters of enough consequence to be disclosed even where there is a specific question as to habitual headaches. *Mutual L. Ins. Co. v. Simpson* (Tex. Civ. App.) 28 S. W. 837.

The same principle is to be applied in construing questions and answers relating to prior attendance by a physician. In response to such question it is not necessary for the applicant to disclose the occasion and circumstances of every consultation of a physician for temporary disability or indisposition, not amounting to a disease. *Blumenthal v. Berkshire L. Ins. Co.*, 134 Mich. 216 (96 N. W. 17, 104 Am. St. Rep. 604); *Franklin L. Ins. Co. v. Galligan*, 71 Ark. 215 (73 S. W. 102, 100 Am. St. Rep. 73).

If, as appears from the evidence, the attention of the examining physician was called to the fact that he himself had been previously consulted as to the stomach trouble of the same character as that for which another physician had previously been consulted, and he indicated to the applicant that it was not necessary to disclose this matter in the answer to the question about

8. SAME.

9. SAME:  
estoppel.

the last attendance by a physician and the complaint as to which he was consulted, then this fact alone would relieve the applicant from any imputation of falsity in the answer, for the applicant was justified in relying upon the regular examiner for advice as to what the question called for. *Mutual Reserve Fund L. Ass'n, v. Ogletree*, 77 Miss. 7 (25 South. 869); *Connecticut Gen. L. Ins. Co. v. McMurdy*, 89 Pa. 363; *Provident L. Assur. Soc. v. Cannon*, 201 Ill. 260, 66 N. E. 388. As already indicated, the evidence showed no irregularity in menstruation at the time of the application, and even if the question were to be interpreted as calling for previous irregularity, the evidence shows that there had been no condition in this respect having the characteristics of a disease which should have been disclosed.

We reach the conclusion that the affirmative defenses based upon the breaches of warranty consisting in false statements, given in answer to the questions propounded to the applicant, were not established by a preponderance of the evidence in any respect.

The judgment is *affirmed*.

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H. H. SAWYER, Appellant, v. V. E. STEINMAN, Appellee.

**Intoxicating liquors: CANVASS OF STATEMENT OF CONSENT: RECORD**

I OF FINDINGS: SUFFICIENCY. A board of supervisors in canvassing a statement of consent to the sale of intoxicating liquors, and in making its record of such canvass, is not required to detail in the record all of the facts upon which its findings are based; but a finding and the record thereof showing that the statement of consent contained the signatures of more than sixty-five percent of the legal voters of the county, outside of a city, who voted at the last general election as shown by the poll list, and also that the statement contained the genuine signatures of a majority of the voters in each town or township of the county, except a certain town and township, was sufficient.

**Same:** CANVASS OF SUCCESSIVE STATEMENTS WITHIN ONE YEAR. The provision of the statute that only one statement of consent to the sale of intoxicating liquors shall be canvassed, "in any one year," means a calendar year, and not an interim of twelve months between the presentation and canvass of successive petitions.

Weaver, J., and Deemer, C. J., dissenting.

*Appeal from Woodbury District Court.*—HON. FRANK R. GAYNOR, Judge.

SATURDAY, JULY 9, 1910.

ACTION of injunction under the statute against the defendant as a saloon keeper of Sioux City. There was a decree in the lower court dismissing the petition, and the plaintiff appeals.—*Affirmed.*

*John F. Joseph*, for appellant.

*Henderson & Fribourg*, for appellee.

EVANS, J.—The case was tried below upon a written stipulation as to the facts. This stipulation provided "that the defendant in this action has in all respects complied with all of the provisions of title 12, chapter 6, of the Code of Iowa and the amendment thereto, unless it be with respect to the petition of consent filed with the county auditor and canvassed by the board of supervisors and as appears on the records," etc. The records of the board of supervisors are stipulated into the record of the trial. From these it appears that in January, 1901, the board of supervisors of Woodbury County canvassed a certain statement of consent for the sale of intoxicating liquors under the mullet law in territory outside of Sioux City, that being the only city in the county containing five thousand or more inhabitants, and they caused to be entered of record their

purported finding as to the result. The defendant's saloon is and was operated in the town of Cushing, an incorporated town in the township of Rock in said county. It is urged by the appellant that the record of the finding of the board of supervisors was not sufficient in detail and form to confer authority upon any person to operate a saloon in the town of Cushing. The finding of the board of supervisors in that respect as appears from its record is as follows: "That said statements contain the genuine written signature of more than sixty-five (65) percent of all of the legal voters of Woodbury County, Iowa, outside of Sioux City, who voted at the last general election, as shown by the poll list of said election; and also contain the genuine signature of a majority of the voters of every town and township in Woodbury County except the town and township of Sloan and township of Woodbury."

I. It is argued by appellant that this record is insufficient because it does not set forth specifically the names of the towns and townships, and does not state the number of voters in each township and the number of petitioners therein. It is urged that this finding, "merely recites the ultimate conclusion, and is not a statement of the facts as required by the statute."

1. INTOXICATING  
LIQUORS:  
canvass of  
statement  
of consent:  
record of  
findings:  
sufficiency.

Section 2450 provides for the canvass of a statement of consent by the board of supervisors, and provides that "its finding as to the result in . . . the various towns and townships therein shall be entered of record, and such finding shall be effectual for the purpose herein contemplated until revoked as herein contemplated." There is no provision of the statute which in terms requires a "statement of facts" as contended for by appellant to be entered of record. "Its finding as to the result," and this alone, is required to be entered of record. The fair construction of this language does not in our judgment require the details of facts to be entered upon the record of the board

of supervisors. The only purpose that could be subserved by setting forth the number of voters in a township and the number of voters who had signed the statement of consent would be to enable any person to determine for himself whether the requisite majority appeared from such township. But the duty of making this finding and entering the same of record was cast by the statute upon the board of supervisors. It did not require that the evidence upon which the finding was made should be entered of record.

Nor does the statute prescribe the form of the "finding" in other respects. It does not in terms require that each township be named upon the records of the board. It should undoubtedly be construed to require that the finding of the board be sufficiently definite so that it could be ascertained therefrom to a certainty whether a saloon might lawfully be operated in the incorporated town of Cushing in Rock Township. We think that fact does appear from the finding entered of record as definitely and certainly as if the name of the town had been incorporated therein. We would therefore be trifling with the statute to hold that the record was insufficient for failure to incorporate therein the name of the town. Our conclusion is that the trial court rightly held that the finding of the board of supervisors as entered of record was not vulnerable to the complaint made against it.

II. It appears that in April, 1900, the board of supervisors canvassed a statement of consent for the same territory as is considered in the foregoing division of this opinion, and that it entered of record its finding thereon to the effect "that it is sufficient for the following townships, to wit." It did not affirmatively show any finding by the board that a majority of the voters in any township had signed the statement of consent. Its only finding in that respect was that sixty-five percent of the voters in

2. SAME:  
canvass of  
successive  
statements  
within one  
year.



the county, outside of Sioux City, had signed the same. It failed, therefore, to state the ultimate facts as distinguished from legal conclusions, and by common consent it appears to have been deemed insufficient. Thereupon another statement of consent was presented which was passed upon as already indicated on January 7, 1901. It is now argued that the second canvass of the statement of consent was illegal and void because it was had within twelve months succeeding the prior canvass. Whether the question of the right of the board of supervisors to make this second canvass at the time that it did can be raised at this time and in this way we will not stop to consider, but will deal with the question as the appellant presents it. Section 2450 provides that "only one statement of general consent . . . shall be canvassed by the board of supervisors *in any one year*." Appellant's argument at this point turns upon the construction which should be put upon the expression "in any one year."

Appellant contends that it should be construed as equivalent to "within twelve months." The word "year" is, of course, often used as meaning a period of twelve months. But it is manifest that a clear distinction may exist between the expressions "within twelve months" and "in any one year." Under our statute of definitions, the word "year" is presumptively equivalent to "year of our Lord." Section 48, par. 11. This latter expression undoubtedly means an identical year as indicated by the Christian calendar, commencing January 1st and ending December 31st. And we think that must be the construction to be placed upon the statute under consideration. No cases are cited to us which hold to the contrary. For cases adopting such construction, see, *Garfield v. Dodsworth*, 9 Kan. App. 752 (58 Pac. 565); *Atlanta v. Ray*, 70 Ga. 674; *Fretwell v. McLemore*, 52 Ala. 145; *Engleman v. State*, 2 Ind. 91 (52 Am. Dec. 494). Appellant places some reliance upon the case of *In re Intoxicating Liquors*, 120 Iowa,

680. That case, however, does not support the argument. That case was made to turn upon another point, and the point, which we are now considering was not considered. We think the trial court correctly construed the statute at these points.

It is argued that we should construe these statutes so as to prevent evasion, as provided therein, and this we are at all times disposed to do. But this does not mean that we shall add anything to a statute by judicial construction *ex post facto*. Let the law be diligently enforced in letter and in spirit; but let it be written plainly, and judicially construed as written, so that every offender may know his offense before he commit it. In such way, and in such way only, may the ax of sure and severe punishment fall justly.

The order of the trial court is *affirmed*.

WEAVER, J. (dissenting).—1. The statement in the foregoing opinion the “finding as to the result and this alone” is the sole requirement of the statute, while correct in a certain sense, has the effect as there used to unduly narrow the expressed legislative intent. What the statute requires is that a record shall be made of the board’s “finding as to the result . . . in the various towns and townships” of the county. This I interpret as meaning that the record shall show, not merely the broad conclusion stated in general terms that the petition is or is not subscribed by a “majority of the voters of every town and township in Woodbury County,” with certain exceptions, but a record showing, as to each and every town and township, the number of voters disclosed by the poll lists of the last general election, and the number of such voters whose names appear on the petition of consent. Without such record, the right of appeal which the statute preserves to every citizen of the county would be greatly hampered. It leaves every essential fact veiled in impenetrable ob-

security. The simple statement that the petition was signed by a majority of the listed voters in all the towns and townships of the county is not a statement of the results of the canvass, but is rather a statement of the conclusions of mixed law and fact which the board has drawn from the result of its canvass—a result of which no record has been made. If this board was canvassing the votes upon the election of the county treasurer or other officer a mere record that a certain candidate received a majority of the votes without any statement or showing of the number of votes cast and for whom cast would not be tolerated, and I am unable to see why any less specific record should be approved in the case at bar.

II. Concerning the other question treated in the opinion, I am inclined to the view that the statutory provision that no more than one statement of consent shall be canvassed by the board “in any one year” was intended to insure an interim or period of repose of at least one year between the presentation and canvass of successive petitions. If this be the intent, then the construction adopted by the majority, that the phrase “in any one year” is meant the calendar year from January 1st to December 31st, inclusive, serves or may serve to defeat it, and, although the board has canvassed and found insufficient a petition of consent at its November term, it may proceed to canvass another at its next meeting in January following. I think it was the purpose of the Legislature to avoid such results, and that at least twelve months should intervene after one canvass is made before another is undertaken.

In my judgment the decree appealed from ought to be reversed.

DEEMER, C. J., concurs in the foregoing dissent,

STATE OF IOWA, Appellee, v. JOHN HEFT, Appellant.

**Criminal Law: GRAND JURY: SELECTION.** The court may, during  
1 the term, reconvene the same grand jury, or it may recall the whole panel and order the drawing of a new jury, and a valid indictment can be found by either. And even if there was a technical irregularity in drawing the jury it would not affect the validity of an indictment found by it, unless it could be reasonably inferred that the defendant was prejudiced thereby.

**Same: RAPE: INDICTMENT: DUPLICITY.** An indictment charging as-  
2 sault and rape on a female under fifteen years of age is not subject to the objection that it charges two offenses; as the age of the female precludes consent, and if the crime was committed against her will there would be an assault in fact.

**Same: REASONABLE DOUBT AS TO THE DEGREE OF AN OFFENSE: INSTRUCTIONS.** Where there is reasonable doubt of the degree of the offense of which a defendant has been proven to be guilty, he can, under the statute, only be convicted of the lower degree; and he is entitled to an instruction to that effect. In the instant case the instructions are reviewed and, as the result of an equal division of the court, are held to satisfy the requirements of the statute.

**Venue: EVIDENCE.** Where an indictment alleges that the offense was  
4 committed at a certain farm in the county, and a witness testifies that the farm was about five miles distant from a certain city, and that she always supposed that it was in the county, but did not know, there is sufficient evidence to take the issue to the jury.

**Same: SUBMISSION OF THE ISSUE OF VENUE.** Where the court fails  
5 to enumerate the material allegations of the indictment, but simply instructs that the state must prove every material allegation beyond a reasonable doubt, there is a technical failure to properly submit the issue of venue. But under the record in this case the error is not sufficient to justify a reversal on that ground alone.

**Judicial notice.** Courts will take judicial notice of the geography  
6 of the state, and that a point five miles from a given city is in a certain county; but can not judicially know that a given farm is within such county.

**Appeal:** ABSTRACTS: UNDISPUTED EVIDENCE. The evidence as disclosed by appellant's abstract, which is not disputed by appellee, will stand as correct. And where no corroborating evidence is shown in a prosecution for rape, a verdict of guilty will not be upheld.

*Appeal from Buchanan District Court.*—HON. F. C. PLATT, Judge.

THURSDAY, SEPTEMBER 29, 1910.

PROSECUTION for rape upon a child under fifteen years of age. Plea of not guilty. Trial to a jury and verdict of guilty of the crime of rape as charged in the indictment. Judgment was entered upon the verdict fixing punishment at thirty years in the penitentiary. Defendant appeals.—*Reversed and remanded.*

*Cook & Cook*, for appellant.

*H. W. Byers, C. W. Lyon, and R. J. O'Brien*, for the State.

EVANS, J.—Upon the return of the indictment in this case, the defendant filed a motion to quash the same because the grand jury was not drawn in the manner required by law. This complaint has many phases and specifications, all of which center about two or three principal facts. The February, 1909, term of the Buchanan district court began on February 15th. On that day the grand jury panel appeared, and a grand jury of seven persons was selected therefrom. On February 16th the grand jury was formally discharged for the term by order of the court, and its members were told to return at the next term, which would be in September. Later in the term, for some reason, the court ordered the grand jury to be reconvened. The method adopted was that the panel was summoned and a new grand jury drawn therefrom. The second drawing

occurred on February 23d and resulted in the selection of two grand jurors out of the panel who were not selected as grand jurors on the first day of the term. The other five grand jurors were selected to serve for the February term at each drawing. The general course of appellant's argument is that the seven jurors first drawn necessarily, as a matter of law, constituted the grand jury for the February term, and that the court was without power to order in the panel and to draw another grand jury for the same term.

The question here argued has been fully covered by our previous decisions. That the court could properly have reconvened the same grand jury—that is, the same seven grand jurors who were selected on the first day of the term—as a February grand jury, was held in *State v. Philips*, 119 Iowa, 652.

1. CRIMINAL LAW:  
grand jury:  
selection.

But the failure to proceed in this manner was in no sense fatal to the indictment. The court had equal power for proper reasons to recall the entire panel and to order a redrawing of a grand jury therefrom. This was so held in *State v. Hughes*, 58 Iowa, 165; *State v. Disbrow*, 130 Iowa, 19. Somewhat analogous also is *State v. Hart*, 67 Iowa, 142. The general reasons underlying these cases are that the trial court has full power to discharge the grand jury for the term. It may also during the term set aside such order and recall the same grand jury. It has like power to let the order of discharge stand and to recall the grand jury panel and to select a new grand jury therefrom. The exercise of such power involves no presumptive hardship toward any defendant. It has long been the settled law of this state that a substantial compliance with the statute in the selection of grand jurors is sufficient, and that a slight deviation from statutory methods and a merely technical irregularity will not invalidate an indictment, unless it may reasonably be inferred from the circumstances that some prejudice has resulted

to the defendant. *State v. Carter*, 144 Iowa, 371; *Shaw v. Orr*, 30 Iowa, 355; *State v. Brandt*, 44 Iowa, 593. The trial court properly overruled the motion to quash the indictment.

II. The defendant was tried under the following indictment: "The grand jury of the county of Buchanan, in the name and by the authority of the state of Iowa, accuses John Heft of the crime of rape committed as follows: The said John Heft on or about the 15th day of November, in the year of our Lord one thousand nine hundred and eight, in the county aforesaid, did in and upon one Clara Heft, then and there being a female child under the age of fifteen years, unlawfully, willfully, and feloniously make an assault, and did then and there carnally know and abuse said Clara Heft, contrary to and in violation of law." The defendant demurred to the same as being bad for duplicity, in that it charged two offenses. Appellant's argument is that the indictment charges the crime of rape upon a child under fifteen years of age, and that it also charges assault. It is argued that assault is not a necessary element of the crime of rape upon a child under fifteen years of age. Granting for the sake of argument that such crime may be committed without an assault, it does not follow that it is necessarily committed in that way. The crime may be committed upon a child under age whether she consent or refuse. If she consent, the law will not deem it a consent. And if she actually refuse and resist, she only does in fact what she is presumed to do in law, and in a legal sense the offense is the same in either case. If rape should be committed by actual force upon a resisting female under age, it would necessarily involve an actual assault. The indictment, therefore, charges but one offense, and it is not bad for duplicity. *State v. Casford*, 76 Iowa, 330; *State v. Peterson*, 110 Iowa, 647.

III. We proceed now to the consideration of a ques-

tion upon which the members of the court are equally divided in opinion. The view with which the writer of the opinion is in accord will be first stated.

The prosecutrix is the daughter of the defendant and was only thirteen years of age at the time of the alleged offense. The *corpus delicti* is established, if at all, by

3. SAME: reasonable doubt as to the degree of an offense: instructions.

her testimony alone. As might have been expected, such testimony was not very definite in its terms and was adduced somewhat by the aid of leading questions, which

the court may properly permit in such a case. Her evidence was such, and likewise the corroboration, that a jury might have been satisfied therefrom beyond a reasonable doubt that an offense was committed, and yet might have had reasonable doubt as to whether such offense was rape accomplished, or merely an assault with intent to commit rape. The defendant asked the court to instruct the jury that, if they had a reasonable doubt on this question, they could find the defendant guilty only of the lower offense, viz., assault with intent to commit rape. The instruction as asked was in substantial accord with section 5377 of the Code, with some verbal inaccuracies, however. It was sufficient to bring the subject fairly to the attention of the court, and the evidence was such as to require an instruction on that subject. The defendant was entitled either to the instructions as asked or to some other proper instruction upon that subject. It is contended by the state that the question was fairly covered by the instructions of the court as given. We have gone through the record with care, and we think it must be said that the court overlooked this feature of the case.

Code, section 5377, is as follows: "Where there is a reasonable doubt of the degree of the offense of which defendant is proven to be guilty, he shall only be convicted of the lower degree." In construing this section in *State v. Jay*, 57 Iowa, 164, this court said: "In the thirteenth



instruction given by the court as to the reasonable doubt which entitles a party to an acquittal, no reference is made to the provisions contained in section 4429 (now section 5377) of the Code that, when 'there is a reasonable doubt of the degree of the offense of which defendant is proven to be guilty, he shall only be convicted of the lower degree.' Indeed, the instructions throughout are silent as to this rule of law. We think defendant was entitled to full instruction upon the question of reasonable doubt, and such as were applicable to the character of the crimes included in the indictment, and that as the instructions omitted the important qualification that a conviction could only be had for the highest crime included in that charged of which there was no reasonable doubt of guilt, under the evidence, the omission was prejudicial to defendant." To the same effect is *State v. Neis*, 68 Iowa, 469.

Our attention is directed to instruction 12, which is as follows: "(12) The indictment in this case charges the defendant with the crime of rape. Under the law, however, if the facts justify it, defendants may be found guilty of assault with intent to commit rape. You would not be justified, however, in finding the defendant guilty of assault with intent to commit rape if you find from the evidence that he carnally knew and abused the prosecutrix as charged in the indictment, that she was under the age of fifteen years at the time, and that the defendant actually penetrated the sexual organs of the prosecuting witness, Clara Heft, with his organ of generation; for in such case he is guilty of rape, and of rape only."

We think, however, that this instruction clearly fails to give the defendant the benefit of section 5377, and to comply with the rule laid down in the cited cases. Indeed, this instruction emphasizes the converse of the rule argued for by the defendant.

Our attention is also directed by the state to instruc-

tions fifteen and sixteen, which were given by the court, and which are as follows:

(15) You are instructed that it is rape to carnally know and abuse a female child under the age of fifteen years, without reference to whether she consent to the intercourse, or whether she refuses or resists. If a female child is under the age of fifteen years, she is incapable of giving her consent to the act. Therefore, if you find from the evidence that the defendant attempted to have sexual intercourse with Clara Heft, and that she was under the age of fifteen years at that time, and if you find that the defendant failed in his attempt to penetrate the body of the child with his organ of generation, he was guilty of assault with intent to commit rape, even though you find that the defendant expected to accomplish his purpose without opposition.

(16) You are instructed that the intent is the essence of the crime of assault with intent to commit rape, and, before you can convict the defendant of the crime of assault with intent to commit rape, you must find from the evidence that the defendant intended to have sexual intercourse with his daughter, the prosecutrix, on the occasion complained of. If you find from the evidence that the defendant called his daughter, Clara Heft, to his bed; that he laid his hands on her private parts and caused her to take hold of his organ of generation; that he attempted to effect even the slightest penetration—then, from these facts, you are instructed that the law would presume an intent on the part of the defendant to have sexual intercourse with the prosecutrix. Such presumption, however, may be rebutted or overcome by evidence that would show that such an intent did not exist, and you should therefore consider all the evidence before you that bears upon this question to determine whether the defendant intended or did not intend to have sexual intercourse with the prosecutrix.

We do not think these instructions fairly meet the requirement of the statute referred to. The higher and lower offenses were held before the jury therein on an equal footing. They presented to the jury no suggestion that a reasonable doubt was to be solved in favor of the lower

offense as against the higher. Each instruction contains a palpable error, in that it shifted the burden of proof upon the defendant. By instruction fifteen the jury was not permitted to find the defendant guilty of the lower offense unless it should "find that the defendant failed in his attempt to penetrate the body of the child." Clearly a reasonable doubt on that question was all that was necessary in order to send the jury to the lower offense. It was not necessary that the jury should affirmatively find a failure of penetration.

The error in instruction sixteen at this point is more prominent. The jury was instructed that upon a certain state of facts recited therein the law raised a presumption of criminal intent, which presumption might be overcome by other evidence. We know of no such rule of legal presumption. That the purported facts recited in the instruction would be sufficient to warrant an inference by the jury of criminal intent, and that they would sustain a finding to that effect, is manifest, and this is probably what the trial court had in mind. But this falls far short of a legal presumption. Under our Constitution the rule is imperative and has been often reiterated that in a prosecution for a criminal offense there is no legal presumption of guilt at any stage, and the burden of proof remains with the state unto the end. Whether a given state of facts is sufficient to warrant or sustain a finding of guilty by the jury is a question of law; but it always remains with the jury to determine whether from such facts an inference of guilt shall be drawn. The language of the courts has not always been discriminating at this point, and the words "presumption" and "inference" have at times been used as synonymous. But where the word "presumption" is used in such cases, it always has reference to a presumption of fact which is subject to the judgment of the jury, and not to a presumption of law which is obligatory upon the jury.

These instructions therefore not only failed to give defendant the benefit of section 5377, but by affirmative error they each emphasized the presumptive prejudice resulting from the omission. It should be said, however, that defendant has made no complaint of these particular errors above discussed, and they can not of themselves, therefore, be made a ground of reversal.

Instruction seventeen is the only other instruction which makes any reference to the lower offense, and is as follows: "(17) If you believe from the evidence that the defendant did not call his daughter Clara to his bed, as claimed by the prosecutrix, and that he made no attempt to have sexual intercourse with her, he is innocent of the crime charged in the indictment, and, in case you so find, he is not guilty of rape, or of assault with intent to commit rape, your verdict should be not guilty."

Neither does this instruction cure the omission which we have already discussed. This instruction is also unfortunate in its form of statement. Its clear implication is that, in order to find the defendant not guilty, the jury must "believe from the evidence that the defendant did not call his daughter, . . .," etc., and that he "made no attempt," etc. This would lay upon the defendant the affirmative burden of proving his innocence. In order to acquit, it was not necessary that the jury should "believe" any of the matters recited in this instruction. They might have grave suspicions of the defendant's guilt, and could not therefore "believe" him to be innocent, and yet have a reasonable doubt of his guilt. We are constrained, therefore, to the view that there was substantial error of omission at this point, and that it was not cured by any instruction given. *State v. Jay*, 57 Iowa, 164; *State v. Neis*, 68 Iowa, 469; *State v. Walters*, 45 Iowa, 389.

As against these views, three members of the court are of the opinion that the question under consideration is sufficiently met by the instructions already quoted and by

instructions Nos. 3 and 4, upon which some stress is laid. These latter instructions are as follows:

(3) You are instructed that the defendant is presumed to be innocent, and that it is incumbent on the state to prove every material allegation of the indictment before the defendant can be convicted of the crime alleged to have been committed, and the same must be proved beyond a reasonable doubt. The doubt, however, must be natural, substantial, rational, and conscientious, and not mere speculation. Everything relating to human affairs and depending upon human testimony is open to some possible or imaginary doubt. If the whole evidence taken together produces such conviction in your minds of the guilt of the defendant as you would act upon in matters of the highest and greatest importance, it is your duty to convict; but if the whole evidence taken together produced in your minds a doubt which, without being sought after, fairly and naturally arises after comparing the whole evidence in the case, it is your duty to acquit the defendant.

(4) You have been instructed that you can not convict the defendant if you have a reasonable doubt of his guilt. In subsequent instructions this rule, which must govern your consideration of the case, will not be repeated or called to your attention in each separate instruction. You are to remember that the defendant can not be convicted if you have a reasonable doubt of his guilt, and all the instructions are given you with that rule as your guide in considering and determining every charge of the indictment, as defined under the rules given you in these instructions.

IV. Complaint is made because the venue of the offense was not proved and because the issue was not submitted to the jury. The offense was alleged to have been committed at the "Grassel farm," sometimes known in the record also as the "Rettig" farm. The sister of the prosecutrix testified that this farm was situated about five miles south of Independence, and that she had always supposed it was in Buchanan County, but did not know. We think this evidence was

4. VENUE:  
evidence.

sufficient to carry the question of venue to the jury. See *State v. Mitchell*, 139 Iowa, 455; *State v. Goodsell*, 138 Iowa, 504, and cases therein cited.

But it is urged also that the court failed to submit this issue to the jury. In its third instruction the trial court instructed "that it is incumbent on the state to prove

every material allegation of the indictment before the defendant can be convicted of the crime alleged to have been committed, and the same must be proved beyond a reasonable doubt."

This is the only instruction in which the question can be said to be covered, if at all. The court did not advise the jury what the material allegations of the indictment were, nor is there any statement that the allegation of venue is a material allegation. All of the other instructions directed the attention of the jury to the question of the guilt or innocence of the defendant, and it is manifest that the jury might deem the defendant guilty without finding the venue of his offense in Buchanan County.

The courts will take judicial notice of the geography of the state, and this rule would enable us to say as a matter of judicial knowledge that any point within five

miles south of Independence was in Buchanan County. It is doubtless true, however, that we could not take judicial notice that the "Grassel farm" was within five miles south of Independence. This was a fact to be proved. It was testified to by a witness for the state. This testimony was in no manner questioned on the trial. The defendant was a witness in his own behalf and as such took no issue with the testimony of the state on that question.

We think it must be said that there was technical error in the failure to submit the question of venue to the jury. But the error was purely technical and without substantial merit upon the whole record. We would not,

5. SAME:  
submission of  
the issue of  
venue.

6. JUDICIAL  
NOTICE.

therefore, be justified in reversing the case upon that ground. Code, section 5462.

V. It is urged by the defendant that there was not sufficient corroborating evidence to carry the case to the jury. The only corroborating evidence was given by the sister of the prosecutrix. Her testimony, so far as it related to this particular offense, was very slight indeed, and the record before us is not very clear as to just what it was. In his argument for the state, the Attorney General quotes from her testimony as follows: "A. He asked if I heard Clara squeal in the night? . . . I saw Clara in bed with my father." No reply argument has been filed by the appellant. But the last sentence, which purports to be quoted in the argument for the state, is not in accord with appellant's abstract. What appears in such abstract is, "I never saw Clara in bed with my father." An amended abstract was filed by the state, which has made many verbal corrections in appellant's abstract by reference to line and page. But we are not able to discover any correction which relates to this sentence. This testimony is vital to the prosecution, inasmuch as it comprises practically all of the corroborating testimony. As the record is made, we are bound to treat the appellant's abstract as correct at this point, which leaves the state without corroborating evidence as to the particular offense upon which it has elected to rely for conviction.

Many exceptions to rulings on evidence are argued. We have considered them all and find none of them well taken. The rulings of the trial court in this respect were eminently fair, and we find no error therein. The same may be said of other assignments of error by appellant. We are agreed, however, that upon the whole record the case must be reversed, and a new trial granted and it is so ordered.

*Reversed and remanded.*

7. APPEAL:  
abstracts:  
undisputed  
evidence.

STATE OF IOWA, Appellee, v. WILLIAM YOUNG, Appellant.

**Criminal law: APPEAL: RECORD: JUDGMENT.** In criminal cases there  
1 can be no appeal except from a final judgment; so that where  
the record fails to show either an indictment or judgment, and  
the abstract recites that after a verdict of guilty defendant was  
given time to move in arrest of judgment and for a new trial,  
but failed to show any ruling on the motion or exception taken,  
except as to a ruling on the motion to direct a verdict, the ap-  
peal was not sustainable.

**Adultery: INSTITUTION OF PROSECUTION.** Where the record on a  
2 prosecution for adultery shows that defendant's wife consulted  
the county attorney with the view of commencing prosecution,  
and that she went before the grand jury without subpoena for  
that purpose, there was a sufficient showing that the prosecution  
was instituted by the wife.

*Appeal from Wapello District Court.*—HON. D. M. ANDER-  
SON, Judge.

WEDNESDAY, OCTOBER 19, 1910.

As stated in argument, defendant was convicted of the  
crime of adultery, and appeals.—*Dismissed.*

*A. B. Williams* and *A. W. Enoch*, for appellant.

*H. W. Byers*, Attorney General, and *Chas. W. Lyon*,  
Assistant Attorney General, for the State.

DEEMER, C. J.—The record as presented to us does  
not show either an indictment or an appealable judgment.  
What purports to be the testimony in some criminal case  
is in an abstract, and from this it appears that someone  
was being tried for adultery. Save from inference, it does



not appear that there was a jury trial, although the abstract recites that after a verdict of guilty defendant was given time to file a motion in arrest of judgment and for a new trial. Such a motion was filed after verdict, but the record shows no ruling thereon, and no exception taken, except to a ruling on a motion to direct a verdict. No judgment appears, and the only thing which looks like a finality is the verdict of guilty.

I. In criminal cases there can be no appeal, except from the final judgment. Code, section 5448, and cases cited in annotations, among them *State v. Wheeler*, 65 Iowa, 619, and *State v. Evans*, 111 Iowa, 80. The case does not come within any exception to the rule given by the statute referred to. However, we have looked into the matters argued in appellant's brief, and discover no such error as would have justified us in reversing the case in any event. There is ample testimony to sustain a finding by a jury that the prosecution was commenced on the complaint of defendant's wife. She went to see the county attorney to have the case commenced, and she voluntarily went before the grand jury for that purpose. It does not appear that she was subpoenaed before the grand jury, and the record justified a finding by the trial jury that the action was instituted by defendant's wife.

II. The verdict of guilty also has sufficient support in the testimony. We shall not set it out. Suffice it to say that the members of this court have severally read the record, and are of opinion that there is ample testimony to sustain a verdict of guilty. It is immaterial, so far as this appeal is concerned, whether the final word be affirmed or dismissed; but the more logical conclusion, in view of the statute and our former holdings, is to dismiss.

The order, then, will be that the appeal be *dismissed*.

## STATE OF IOWA V. JOHN KRUMM, Appellant.

**Criminal law: CREDIBILITY OF EVIDENCE: VERDICT: PASSION AND PRE-  
1 JUDICE.** It is the province of the jury to determine the weight  
and credibility of evidence; and the fact that it may not credit  
the testimony of certain witnesses touching a fact essential to  
the defense does not necessarily show such prejudice and passion  
as will vitiate a verdict of guilty.

**Misconduct in argument: PREJUDICE.** The objectionable language  
2 used in this case by the prosecuting attorney in his closing argu-  
ment, which was withdrawn and the jury advised that it was  
improper, is held to have been without prejudice.

**Misconduct of jurors: PREJUDICE.** It is also held that the remark  
3 of a juror made to his fellow jurors while deliberating, that  
he never heard the moral character of the prosecutrix ques-  
tioned prior to the trial, was not sufficient to set aside the ver-  
dict; as the record conclusively shows that no prejudice resulted.

*Appeal from Guthrie District Court.*—HON. J. H. APPLE-  
GATE, Judge.

WEDNESDAY, OCTOBER 19, 1910.

THE defendant was convicted of the crime of seduction,  
and appeals.—*Affirmed.*

*S. B. Gwinn and Sayles & Taylor, for appellant.*

*H. W. Byers, Attorney General, and Charles W. Lyon,  
Assistant General, for the State.*

SHERWIN, J.—I. The appellant's principal conten-  
tion is that the verdict is not supported by the evidence,  
and that it is the result of passion and prejudice. The

crime charged is alleged to have been committed in the early part of August, 1907, and on the 30th day of April, 1908, the prosecutrix gave birth to a child. The defendant did not deny having had sexual intercourse with the prosecutrix. He simply denied that he had had intercourse with her during the month of August, 1907. The state produced evidence tending to show the previous chaste character of the prosecutrix, and the defendant produced two witnesses who testified that they had been unduly intimate with her before the alleged seduction by the defendant. We have carefully considered the evidence before us, and reach the conclusion that it is sufficient to sustain the verdict and judgment. There is considerable evidence tending to show that the prosecutrix was unchaste before she submitted to the defendant, but the witnesses were all before the jury, and it was its duty to determine their credibility and the weight that should be given to their testimony. If the jury did not believe the two witnesses who swore to intimate relations with the prosecutrix, there was no evidence before it which would have justified a finding of previous unchastity. That the jury did not credit the testimony of these two witnesses is manifest, but that does not indicate passion or prejudice that will vitiate its verdict.

In his closing argument for the state, the county attorney spoke of the two witnesses already referred to herein as "dirty dogs." Objection was made to the language, and it was withdrawn, and the court at the same time told the jury that the language was improper. We cannot presume that the jury was in any way influenced by the language; and hence there should be no reversal on account thereof.

One of the jurors in separate conversation with two of his fellow jurors after the case had been submitted to them said that he had never heard the moral character

1. CRIMINAL LAW:  
credibility  
of evidence:  
verdict:  
passion and  
prejudice.

2. MISCONDUCT  
IN ARGUMENT:  
prejudice.

of the prosecutrix questioned before the trial. Without determining whether such statement constituted improper conduct on the juror's part, it is enough to say that the record conclusively shows that no prejudice resulted therefrom. The defendant undertook to prove by two physicians matters which they were incompetent to testify to under section 4608 of the Code. The ruling sustaining objections thereto was right. The judgment of the district court must be, and it is, *affirmed*.

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THORNTON C. SKINNER, Executor of the Estate of J. G. SKINNER, Deceased, v. HENRIETTA COTTRILL, ET AL., Appellant.

**Wills. CONSTRUCTION: ADVANCEMENTS.** In the construction of the will and codicil in question it is held that the language of the will indicates an intention of the testator to distribute his property among his children equally, upon the death of his wife, and in doing so that advancements to certain of his children should be deducted from their respective share, and in determining the extent of the estate the same were to be considered as a part thereof. And it is also held that the codicil was intended to charge the share of one of the heirs with certain advancements, and in case her share of the personalty was not sufficient to cover the same her interest in lands devised to her was to be charged therewith.

*Appeal from Louisa District Court.*—HON. JAMES D. SMYTH, Judge.

WEDNESDAY, OCTOBER 19, 1910.

J. G. SKINNER died testate September 23, 1908. His will directed the payment of debts, gave the widow the use of his estate during life in lieu of dower, bequeathed to two granddaughters, the children of a deceased daughter, \$150 each, instructed the executor to deduct \$200 advanced

to each of two sons from their respective shares of the estate, and;

5th. All the rest of my property, real, personal and mixed, I give and bequeath share and share alike to Jas. L., William, J., Wylie, Hiram and Thornton C. Skinner, my five sons, and Nancy Brown, Henrietta Cottrill and Anna Johnston, my three living daughters. My executor shall not make division till after my wife's death, and in dividing my estate my executor shall, for the purpose of division, add thereto the \$400 advanced by me to Jas. L. and William Skinner.

6th. My executor shall have power to partition all real estate among my children and if in his judgment the same can not be divided into the requisite shares without injuring the same, he shall sell the same, after advertising for three weeks at public auction and execute a deed to the purchaser conveying full title and then shall divide the proceeds.

About five years thereafter he executed a codicil in words following:

I hold a note for \$232 dated May 25, 1899, given by Henrietta Cottril and a note for \$100 dated May 15, 1899, given by Geo. Cottril, to the Iowa State Bank of West Liberty and which I was compelled to pay Nov. 20, 1903, as surety, both of said notes shall be computed by my executor with interest at the rate provided therein up to the day for settlement, to wit, one year from the appointment of said exccutor. That they shall be as to the amount then due treated as an asset and debt due my estate from Henrietta Cottril, and shall be deducted from above amount as though said amount to be determined in manner aforesaid had been advanced by me to her, and this shall be done whether said notes are produced by my executor after my death or not. Should my estate consist in part of land, it is my will that any interest in my land left shall descend to said Henrietta Cottril subject to the aforesaid deduction. Except as herein changed, I hereby reaffirm my original will.

The executor alleged that a dispute over the construction of the will had arisen, and prayed that the will be construed, contending that Henrietta Cottril was entitled to but an undivided one-eighth interest in the estate subject to the use of the widow and deductions of the amount of the notes described in the codicil, while Mrs. Cottril claimed to take thereunder title to any land deceased may have left subject only to the widow's life estate. The district court construed the will as the executor contended it should be, and Henrietta Cottril has appealed.—*Affirmed*.

*C. H. Pasley*, for appellant.

*C. A. Carpenter*, for appellee.

LADD, J.—The language of the will clearly evinces the testator's purpose of distributing his property equally among his eight living children upon the death of his wife. In doing this, advancements to James L. and William are not only to be deducted from their respective shares, but in determining the extent of the estate are to be considered a part thereof. Save as modified by the codicil, the will is by it expressly reaffirmed. This modification, after reciting the execution of a note of \$232 by Henrietta Cottril to the testator and another of \$100 executed by her husband which testator as surety was compelled to pay, directs that the amount of these notes, interest being computed to one year after the appointment of the executor, shall be treated as an asset of the estate due from Mrs. Cottril, "and shall be deducted from above amount as though the amount to be determined in the manner aforesaid had been advanced by me to her, and this shall be done whether these notes are produced by my executor after my death or not. Should my estate consist in part of land, it is my will that any interest in my land left shall descend to said Henrietta Cottril subject to the

aforesaid deduction except as herein changed." But for the provisions of the will, much difficulty might be experienced in construing the last sentence quoted. One-eighth of the testator's real estate had been devised to Mrs. Cottril, and, in speaking of "any interest in my land left," he must have had reference to its disposition in the will. The manifest design of the codicil was to charge her share of the estate with the amount of the notes as advancements, and to make sure of this in event her share of the personalty was not enough to cover the amount "any interest in my land left" (to her) was charged therewith. Though not free from doubt, we are satisfied such was the testator's intention, and the district court rightly so held.—*Affirmed*.

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M. M. PLATTS, Appellee, v. CITY OF OTTUMWA, Appellant.

**Municipal corporations: SIDEWALK ACCIDENT: NEGLIGENCE: EVIDENCE.** In an action for injuries received from an alleged defective sidewalk the question of the city's negligence, under conflicting evidence as to the condition of the walk, is for the jury.

**Same: REPAIR OF WALKS: DUTY OF CITY: RIGHTS OF PEDESTRIANS.** A city is held to a higher degree of diligence and knowledge concerning the condition of its sidewalks than an ordinary pedestrian; and although a pedestrian is required to exercise reasonable care for his own safety he may assume that the city has performed its duty, and he need not be constantly on the lookout for defects, the existence of which have not come to his notice.

*Appeal from Wapello District Court.*—HON. F. W. EICH-ELBERGER, Judge.

WEDNESDAY, OCTOBER, 19, 1910.

ACTION to recover damages for personal injury. Ver-

dict and judgment for plaintiff, and defendant appeals.—  
*Affirmed.*

*Clyde G. Sparks and Gilmore & Moon*, for appellant.

*Cornell & Gillies and Jaques & Jaques*, for appellee.

WEAVER, J.—The plaintiff, having fallen and received bodily injury upon a sidewalk in the defendant city, brings this action to recover the damages so sustained. She charges the fact to be that the sidewalk, which was constructed of brick, was defective and dangerous by reason of a hole or depression in its surface which the defendant had negligently permitted to remain unrepaired for a considerable period of time, and that she without negligence upon her part stepped into said hole or depression, causing her to fall as above stated. The defendant denies the allegations of the petition, denies that it was in any manner negligent with respect to the walk, and avers that, if plaintiff was injured, it was occasioned by her own want of reasonable care. Plaintiff sues both in her own right and as assignee of her husband. There was a trial to a jury, and verdict for plaintiff in the sum of \$550, and from the judgment rendered thereon the defendant appeals.

Counsel for appellant prefaces his argument with the statement that the appeal is based on the contention that a verdict should have been directed in favor of the city

because of failure of evidence to sustain the charge of negligence, and to that question we shall confine our discussion. While there is some dispute as to its precise size, shape, and depth, it is shown beyond all reasonable doubt that there was a depressed place or hole in the walk, and that it was of such depth or extent that a person stepping into it unexpectedly was liable to fall or be thrown down. The proposition most relied on by appellant is that the defect

1. MUNICIPAL  
CORPORATIONS:  
sidewalk  
accident:  
negligence:  
evidence.



was not "open, visible, and notorious" and had not existed such a length of time as to make the defendant chargeable with negligence in failing to discover and remedy it. The walk was twelve feet wide, constructed of brick, and except for the particular place in question appears to have been in good condition. The defect of which plaintiff complains was near the inner edge of the walk, opposite the door or steps of an adjacent building, from which plaintiff was coming when she fell. While it was not conceded by the appellant, there was evidence from which the jury could properly find that said defect had existed at least two weeks, and possibly more. One witness testified that she was present at the time of plaintiff's fall, and recognized the defective place as one into which she herself stepped and fell two weeks earlier. Another had seen it "ten days or two weeks" prior to the accident. Another had noticed an irregularity in the surface of the walk two months before. Other corroborating testimony was produced. On the part of defendant there was evidence tending to show repair of the walk at this point not long prior to the plaintiff's injury, and several witnesses who used the walk daily or frequently had never noticed anything wrong in its condition. It hardly seems necessary to say that under the well-settled law of this jurisdiction the question of defendant's ~~negligence was~~ for the jury to decide, and not for the court to ~~dispose of as a matter~~ of law. *Smith v. Des Moines*, 84 Iowa, 685; *Langhammer v. Manchester*, 99 Iowa, 295; *Hofacre v. Monticello*, 128 Iowa, 239; *Clark v. Cedar Rapids*, 129 Iowa, 358; *Bailey v. Centerville*, 108 Iowa, 20; *Brown v. Chillicothe*, 122 Iowa, 640; *Varnham v. Council Bluffs*, 52 Iowa, 698; *Hoover v. Mapleton*, 110 Iowa, 571; *Beaver v. Eagle Grove*, 116 Iowa, 485; *Padelford v. Eagle Grove*, 117 Iowa, 616.

Counsel call to our attention the case of *Cook v. Anamosa*, 66 Iowa, 427, and other cases, where language is used to the effect that to charge the municipality with

notice the defect must be "open, visible, and notorious," or must be such as to be "observable by all" having occasion to use the walk. The expressions quoted by counsel are somewhat sweeping generalizations, which must be interpreted with some reference to the particular case or class of cases which called them forth. It certainly is not true that the city is charged with no greater duty or obligation to observe the condition of its walks, or to know of the existence of dangerous defects therein, than the ordinary citizen or traveler who has occasion to use them. On the contrary, these municipalities are under some measure of active duty in the matter of inspection, and of taking care to know that the streets, the care of which is imposed upon them by statute, do not become sources of danger to the traveling public. The traveler has the right to assume that the city has done its duty, and while he is himself subject to the rule which requires the exercise of reasonable care and watchfulness for his own safety, he is not required at his peril and as a matter of law to keep his eye glued to the sidewalk or to constantly watch his footsteps to avoid stepping into holes or depressions therein, the existence of which has not come to his notice. He has a right to assume that the city has done its duty. *Keyes v. Cedar Falls*, 107 Iowa, 509. As described by the witnesses, the defect in this particular instance was an open one, existing in the surface of a walk upon one of the principal streets of the city, and observable by all who might look in that direction. That all persons using the walk did not in fact observe the hole is not a decisive test of its observable condition. As we have already said, there was evidence to sustain the fact that a defect existed, that it was of an open and visible character, and that it had existed for weeks, if not for months; and this in our judgment

2. SAME: repair  
of walks:  
duty of city:  
rights of  
pedestrians.

is sufficient to support a finding that appellant was negligent in failing to discover it and make proper repair.

Nor is there anything from which we can say as a matter of law that plaintiff was guilty of negligence. On the contrary, the evidence fairly tends to show that she was in the exercise of due care.

Some exceptions were taken to the rulings on the admission of evidence and to instructions given by the court. We have examined each, and find no prejudicial error.

The judgment of the district court is *affirmed*.

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STATE OF IOWA v. C. M. SMITH, Appellant.

**Criminal law:** INDICTMENT: SUFFICIENCY. The caption of an indictment and the wording thereof do not affect its validity, and may be omitted; so that where the charging part of the indictment sufficiently charges the crime as committed by the defendant the caption is immaterial.

**Same:** MALICIOUS MISCHIEF. An indictment which charges an offense with such certainty and in such manner as to enable a person of common understanding to know what is intended is sufficient; and in this case the indictment charging defendant with malicious mischief is held to comply with the rule.

**Evidence:** CORPORATE CAPACITY: SUFFICIENCY. In this prosecution for malicious injury to the property of a corporation the evidence is held sufficient to show corporate capacity.

*Appeal from Cherokee District Court.*—HON. F. R. GAYNOR, Judge.

WEDNESDAY, OCTOBER 19, 1910.

THE defendant was convicted of maliciously injuring and defacing a building, and appeals.—*Affirmed*.

*Wm. Mulvaney*, for appellant.

*H. W. Byers*, Attorney General, and *Charles W. Lyon*, Assistant Attorney General, for the State.

SHERWIN, J.—The indictment in this case was found under the provisions of section 4822 of the Code, which provides as follows: "If any person maliciously injures, defaces or destroys any building, or fixture attached thereto, or willfully and maliciously destroys, injures or secretes any goods, chattels, or valuable papers of another, he shall be imprisoned in the county jail not more than one year, or be fined not exceeding \$500 and be liable to the party injured in a sum equal to three times the value of the property so destroyed or injured."

The indictment was in the following form: "The grand jury of the county of Cherokee, in the name and by the authority of the state of Iowa, accuses malicious injury to the building and fixtures of the crime of committed as follows: The said C. M. Smith, on or about the 26th day of April, in the year of our Lord one thousand nine hundred and eight, in the county as aforesaid, did willfully and maliciously injure a building, to wit, the building belonging to the New State Telephone Company, located on a part of the south half of lot number eight in block number fourteen, Lebourveau's addition to New Cherokee, Iowa, by the willful and malicious breaking by the said defendant of the plate glass window in the frame door of said building on said date, contrary to the Iowa statutes, all done in Cherokee, Cherokee County, Iowa, said building owner being a corporation duly organized under the laws of Iowa."

The appellant contends in various forms that the indictment in this case is fatally defective, for the reason that it was not drawn in strict compliance with the provisions of section 5281 of the Code. The principal objection

that he makes to the indictment is based upon the fact that the caption of the indictment does not specifically accuse him of any crime. It is said that the indictment is insufficient, because in the caption it is said that the state of Iowa accuses malicious injury of committing a crime, instead of accusing the defendant. There is no merit in this contention, for several reasons. In the first place, the language used in the caption, and even the caption itself, might have been wholly omitted without in any way affecting the validity of the indictment. *State v. McIntire*, 59 Iowa, 264; *State v. Davis*, 41 Iowa, 311. The body of the indictment clearly charges that the crime of malicious mischief was committed by the defendant, C. M. Smith, and every necessary element of a valid indictment is contained in the charging part of this indictment.

It is also said that the charging part of the indictment is too general and uncertain as to the manner of the commission of the alleged offense. There is no merit in this contention. Section 5282 of the Code provides that "the indictment must be direct and certain as regards, first, the party charged; second, the offense charged; and, third, the particular circumstances of the offense charged, when they are necessary to constitute a complete offense." This statute has been often construed by this court, and it is said in *State v. McKinney*, 130 Iowa, 370, that "the offense must be charged with such certainty and in such manner as to enable a person of common understanding to know what is intended. If the indictment is so broad and general in its terms that the accused may be put upon trial for anyone of two or more distinct and independent criminal acts, it is not in compliance with the statute."

Turning to the indictment before us, it is perfectly plain that this defendant is the party charged with the crime, and the indictment specifically charges that he was

1. CRIMINAL LAW:  
indictment:  
sufficiency.

2. SAME: mali-  
cious mischief.

guilty of willful and malicious injury to a building, which is the crime covered by section 4822 heretofore quoted. The particular injury to this building was said in the indictment to be the breaking of a plate glass window, and that was sufficient. The indictment need not allege the instrument with which the breaking was done, nor the particular circumstances under which the act was committed, because they were not necessary to constitute a complete offense. A complete offense under this statute was committed when it was shown that a specific injury was done to the building and that it was done maliciously. The indictment was clearly sufficient and so specific that it could not possibly be construed to charge any other crime than the one for which the defendant was tried. *State v. Caffrey*, 94 Iowa, 65; *State v. Shunka*, 116 Iowa, 206.

While the appellant did not make the point in his brief of points, in argument he says that there was no competent evidence showing that the New State Telephone Company was a corporation. A witness for the state testified that he was the superintendent of the New State Telephone Company, a corporation doing business in the state. That was sufficient proof of the corporate capacity of the owner of the building. *State v. Rozeboom*, 145 Iowa, 620.

We have examined the record presented to us with care, and find no error which requires a reversal of the judgment.

It is therefore *affirmed*.

3. EVIDENCE:  
corporate  
capacity:  
sufficiency.

H. H. SAWYER, Appellant, v. DANIEL J. KELLY and JOHN  
A. MAGOUN, JR.

**Evidence:** FAILURE TO ANSWER: PLEADINGS: ADMISSIONS. Failure of  
1 a defendant to answer the allegations of a petition does not constitute an admission of the truth of the allegations, which is available in another action, unless such failure was made the basis of a default judgment; and in this action failure to answer the petition, which was dismissed before the expiration of the time for answer, was not such an admission.

**Judgments:** CONCLUSIVENESS. A judgment in an action against a  
2 defendant therein is not evidence of the truth of the allegations of the petition, which can be relied upon in another action by a stranger to the judgment.

**Intoxicating liquors:** DISMISSAL OF ACTION: NOTICE TO COUNTY ATTORNEY. Failure to notify the county attorney of a motion to  
3 dismiss an action brought by a citizen to restrain the illegal sale of liquor will not render an order of dismissal invalid, in the sense that it may be collaterally attacked in a wholly independent action; as the requirement of such notice is not jurisdictional the act of the court in dismissing the action without notice is erroneous merely. So that an erroneous dismissal of an action thus made can not be urged as a ground of the invalidity of a renewal of consent to the sale of intoxicating liquors given the assent of a defendant, against whom such action was dismissed.

**Same:** DISMISSAL OF ACTION: FRAUD: CONSENT TO THE SALE OF LIQUOR:  
4 VALIDITY. In this action to enjoin the sale of intoxicating liquors the evidence is held insufficient to establish fraud or collusion by the transferee of a liquor dealer, who received a renewal of consent from the city council, in procuring the dismissal of a suit, so as to render the dismissal invalid, thereby invalidating the consent granted him by the city council.

*Appeal from Woodbury District Court.—HON. WM.  
HUTCHINSON, Judge.*

WEDNESDAY, OCTOBER 19, 1910.

ACTION in equity to enjoin defendant Kelly from selling intoxicating liquors, and to enjoin defendant Magoun from allowing his premises to be used as a place for carrying on such business. There was a decree for defendants, and plaintiff appeals.—*Affirmed.*

*John F. Joseph*, for appellant.

*Sullivan & Griffin*, for appellees.

McCLAIN, J.—On October 13, 1909, under a resolution of consent therefor passed by the city council of Sioux City, defendant Kelly purchased and went into possession of a saloon business in said city as successor to one O'Conner, who had previously been running a saloon under a like resolution of consent on premises owned by defendant Magoun. Defendant Kelly has continued in the business until the present time, and has conducted the business in accordance with the law. At least there is nothing in the evidence to indicate any failure on his part in this respect. But it is contended that he acquired no right to engage in the business for the reason that the council had no authority to grant him consent when it attempted to do so, inasmuch as that at that time the number of saloons being operated in the city by the consent of the council exceeded one for every one thousand of the population of said city, and therefore the granting of consent to maintain another saloon was in violation of the provisions of chapter 142, Acts 33d General Assembly. It is contended for the defendants, however, that the authority which the council attempted to exercise was within the exception to the statute found in section 2 thereof, authorizing renewals of consent to persons to whom such consent may have been granted and to their assignees or grantees, unless the existing resolution of consent in favor of any such person shall have become "inoperative by reason



of the person holding the same violating any of the laws of the state, either civil or criminal, relating to the sale or disposition of intoxicating liquors, or by reason of a permanent injunction issuing against such person for a violation of law, or by reason of a civil or criminal action being commenced or instituted against such person for the violation of any of the laws of the state relating to the sale or disposition of intoxicating liquors, and said person surrendering such resolution of consent before said action is prosecuted to a final judgment or a conviction had in the court in which the same was instituted."

At the time of the actual transfer by O'Conner to defendant Kelly, no injunction had been granted against O'Conner for violation of the law in conducting such business, and no proceeding for an injunction was then pending against him; but it appears that in the preceding August a civil action for an injunction to restrain said O'Conner from continuing to carry on such business, on the ground that his business had been conducted in violation of the law, was instituted by one White as plaintiff, in which action it was also asked that defendant Magoun be enjoined from allowing his premises to be used for such purposes, and that this action was pending until October 12th, the day preceding the sale and transfer of the business to defendant Kelly, when such proceeding was at the request of counsel for plaintiff therein dismissed by the court without prejudice to said plaintiff's future right of action for said cause.

The contention for appellant is that the consent granted by the city council to defendant Kelly was invalid and without authority for the reason, first, that O'Conner who transferred the business to him had violated the law as to the sale of intoxicating liquors; second, that there was a pending suit for an injunction against O'Conner, the dismissal of which by the court was void for failure to give to the county attorney notice of the motion for such

dismissal as required by chapter 82, Acts 30th General Assembly (see Code Supp. 1907, section 2406); and, third, that the dismissal of the action was collusive and fraudulent for the purpose of aiding defendant Kelly to illegally procure the resolution of consent from the city council authorizing him to conduct the business.

I. There is nothing in the record to show that O'Conner had violated any law of the state relating to the sale of intoxicating liquors, thus rendering the resolution of consent which had been adopted by the council in his favor inoperative. The only claim in this respect is that in the petition for an injunction against him filed

1. EVIDENCE:  
failure to  
answer: plead-  
ings: admis-  
sions.

in August preceding the transfer of the business it was alleged that he was using the premises described as a place for the sale of intoxicating liquors, contrary to law, and that this allegation had never been denied. But it appears that while Magoun, a joint defendant in that action, had denied such allegations in his answer filed in September, O'Conner had not been served with notice in such time as to require an answer from him prior to the date of the dismissal of the suit. It is plain, therefore, that his failure to answer prior to such dismissal did not constitute any admission of the truth of the allegations. Indeed, it is elementary that, even as against the defendant himself, the failure to answer the allegations in a petition does not constitute an admission of their truth available in another action, unless the failure to answer has been made the basis of a judgment by default.

It is also elementary that a judgment in one action against a defendant therein does not constitute available evidence of the truth of the allegations of the petition

which may be relied upon by a party in another action, a stranger to the judgment rendered. Nothing is shown, therefore, with reference to O'Conner's violation of the law which would

2. JUDGMENTS:  
conclusive-  
ness.

render inoperative the consent which the council had previously granted to him.

II. Failure to notify the county attorney of the motion to dismiss the injunction proceedings against O'Conner clearly would not render invalid the order of dismissal which

3. INTOXICATING  
LIQUORS: dis-  
missal of ac-  
tion: notice  
to county  
attorney.

was entered by the court on the application of the plaintiff in the action. The provision of the statute already cited is that such an action "when brought by a citizen shall not

be dismissed upon motion of either the plaintiff or defendant, until the county attorney has been notified in writing of the filing of such motion, and until such county attorney shall have made a personal investigation," and reported to the court his recommendation with reference to the disposition of the case. The judge who ordered the dismissal no doubt erred in sustaining the motion without such notice to the county attorney and opportunity given him to make an investigation and report thereon, but plainly the court was not without jurisdiction to enter the dismissal notwithstanding this error. By moving to set aside the dismissal, the plaintiff in that action could no doubt have had it reinstated, but there is nothing in the statute nor in the rules of law applicable to similar regulations regarding the forms of procedure to justify us in holding that such judgment formally entered by a court having jurisdiction to act is void in such sense that it may be collaterally impeached in a wholly independent proceeding. It may be that, had the dismissal been set aside, Kelly, claiming a right dependent on his succession to O'Conner, would have been bound by such action; but in this wholly independent suit, in which Kelly is charged with maintaining a place for the sale of liquors in violation of the law, it is certainly not competent to prove that the county attorney had no notice of the motion to dismiss the action against O'Conner for the purpose of showing that there was a pending proceeding against O'Conner which rendered in-

valid the consent given by the city council to Kelly. There is a manifest distinction between the jurisdiction of a court to render a judgment and its right to do so. If the court had authority to proceed to determine whether the action against O'Conner should be dismissed, its order of dismissal was invulnerable to collateral attack, although erroneous by reason of improper forms of procedure. *Geyer v. Douglass*, 85 Iowa, 93; *Sigmond v. Bebbler*, 104 Iowa, 431; Freeman on Judgments (4th Ed.) section 135.

III. To make effective any claim that the order of dismissal of the action against O'Conner was ineffectual as to Kelly on account of fraud or collusion in such sense

as to render invalid the consent granted to him by the city council, it must appear that he was in some way a party to such collusion and fraud. The circumstances attending the dismissal seem to have been

briefly these: While the action against O'Conner was pending, one Fribourg, as attorney for a creditor of O'Conner, instituted proceedings against him by attachment to enforce the payment of his claim. O'Conner protested that he was going out of business, and could make a sale which would enable him to satisfy his debt, if the action for an injunction were out of the way, so that the purchaser from him could secure consent from the city council for carrying on the business. Thereupon Fribourg explained the situation to Collier, the attorney for the plaintiff in the action for an injunction against O'Conner, and represented to Collier that O'Conner was quitting the business, and the action might properly be dismissed. Fribourg also represented to the judge who was then holding the district court in the county that O'Conner was going out of business, and subsequently Collier filed a motion in behalf of his client for such dismissal, and appeared before the judge acquiescing in Fribourg's representation that there was no longer occasion to proceed against O'Conner;

4- SAME: dismissal of action: fraud: consent to the sale of liquor: validity.

and the entry of dismissal was thereupon made. The only knowledge which defendant Kelly is shown to have had in regard to the matter was that there was an action pending against O'Conner, and he refused to proceed with the purchase of the business from O'Conner, unless such action was dismissed. The order of dismissal was entered before he paid any part of the purchase price or received a bill of sale for the business, and before he went into possession. The resolution of consent to the conducting of the business by Kelly was passed by the city council after the dismissal of the action by the court, and before Kelly paid the purchase price or entered into possession. Defendant Kelly was not chargeable with any knowledge which Fribourg may have had as to the purpose for which the dismissal was procured; for Fribourg was not Kelly's attorney, and was not acting for him in any capacity, save that Kelly intrusted the purchase price to Fribourg, with the condition that it should be applied to the satisfaction of O'Conner's debt, and the balance turned over to O'Conner only in the event that the action against O'Conner was dismissed. As to Fribourg, it can not be said that he was guilty of any collusion, for his sole interest and responsibility as to any of the parties was to secure the payment of the purchase price from Kelly in order to realize on the claim which he represented as against O'Conner.

As to Collier, nothing which he did or omitted to do is chargeable by way of collusion to Kelly. Whatever may have been his fault, if any, in not notifying the county attorney of his motion, and explaining to the court the purpose of the dismissal, it is plain that such fault would not be chargeable to Kelly, who was without notice thereof.

We reach the conclusion that, so far as it appears from the record, the consent granted to Kelly by the city council was valid, and that he had therefore been lawfully conducting the business of selling intoxicating liquors.

We find no occasion for discussing the situation of defendant Magoun. As the owner of the premises, he could not properly be enjoined in this action for continuing to permit them to be used by his codefendant Kelly; it not appearing that such use by Kelly was unlawful.

The decree of the trial court is therefore *affirmed*.

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**MAY FISHER, Plaintiff, v. JAMES BOLTON, Defendant.**

**Seduction:** ACTION FOR DAMAGES: INSTRUCTION. Where it is established by the evidence in a civil action for seduction that plaintiff was unchaste prior to a certain date, an instruction that she could not recover unless she had reformed between that time, and the date of a subsequent alleged seduction, was more favorable to defendant than he was entitled to have given; as the rule stated by the court is applicable in criminal cases, but not to its full extent in civil actions for seduction.

**Same:** EVIDENCE: PREVIOUS RELATION OF THE PARTIES. In a civil action for seduction the previous relations of the parties may be shown as bearing on the question of influence and power of the defendant over the plaintiff which he might not otherwise have had; and is important in determining whether her yielding to the demands of defendant was inconsistent with previous chastity of character and purpose.

**Same:** PROMISE OF MARRIAGE: EVIDENCE. In a civil action for seduction a promise of marriage need not be proved in express terms or by direct evidence. Evidence held sufficient to warrant the jury in finding a promise of marriage as one of the artifices by which the seduction was accomplished.

**Appeal:** ARGUMENT. Under the Supreme Court rules appellant is not permitted to reserve the citation of authorities for his reply argument.

**Seduction:** DAMAGES: INSTRUCTION. The instruction in this action relative to plaintiff's right to recover for loss of time is held to have been without prejudice, even though there was no evidence of loss of time on account of the seduction.

**Appeal:** ARGUMENT: OBJECTION TO EVIDENCE. Appellant is required

- 6 to disclose in his opening argument the points relied upon for a reversal; he can not raise new points in his reply. Nor can an objection to the competency of evidence not made on the trial be urged on appeal, or advanced for the first time on appeal in a reply argument.

*Appeal from Pottawattamie District Court.*—HON. N. W. MAOY, Judge.

WEDNESDAY, OCTOBER 19, 1910.

CIVIL action for damages for seduction. There was a verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

*Flickinger Bros. and Turner & Cullison*, for appellant.

*Frank Shinn and Ira R. Stitt*, for appellee.

EVANS, J.—The plaintiff's testimony tended to show: That in the latter part of the year 1901 she and the defendant became engaged to be married. That under cover of such engagement and by protestations of love the defendant first accomplished the plaintiff's seduction in 1901, and that such relation continued and such acts were repeated many times up to October or November, 1906. That on or about such latter date the plaintiff determined to change her course and to reform, and that she did so reform and was guilty of no improper conduct until June 23, 1907, upon which date the same illicit relations were resumed during a visit to her by the defendant, and the birth of a child resulted therefrom on March 22, 1908. Her pleading was predicated upon the act of June 23, 1907.

I. As preliminary to a discussion of the particular points presented for our consideration by the appellant, it may be stated that the trial court instructed the jury

that the plaintiff was under her own testimony unchaste in the eyes of the law up to October or November, 1906, and that she could recover nothing in this section unless she had proved her reform after that date and before June 23, 1907. This instruction was more favorable to the defendant than he was entitled to have given. The rule stated in the instruction is applicable to criminal cases, and does not apply in civil cases to the extent indicated by the trial court. *Smith v. Milburn*, 17 Iowa, 37; *Olson v. Rice*, 140 Iowa, 630; *Breiner v. Nugent*, 136 Iowa, 322. This disposes of the certain objections made by defendant in relation to this subject.

II. In support of the charge that the plaintiff was seduced June 23, 1907, the trial court permitted the plaintiff to put in evidence the previous relations between the parties from 1901 down to the time of the alleged last seduction, and by an instruction to the jury confined the purpose thereof to determine the previous relations between the parties, and to show what, if any, influence, power, or control the defendant thereby had over the plaintiff at the time of the alleged seduction in June, 1907. The defendant complains of this testimony and of this instruction, and takes the broad ground that it was a great wrong to the defendant to permit the previous relations between the parties to be "laid bare." The action of the trial court was in accord with principle and authority. *Baird v. Boehner*, 77 Iowa, 622. If the previous relations between the parties were such as to give the defendant an advantage and power over plaintiff which he would not otherwise have had, it was an important consideration in determining whether the yielding of the plaintiff was inconsistent with previous chastity of character and purpose.

III. In the seventh paragraph of the instructions, the trial court instructed the jury to ascertain whether the



defendant accomplished his purpose by means of manifestations of love and affection and promise of marriage. Particular complaint is made

3. SAME: promise of marriage: evidence.

of this instruction on the alleged ground that there is no evidence of any promise of marriage just prior to the act of June 23, 1907. It is true that the plaintiff did not testify to any direct promise of marriage on this occasion. It is also true that the plaintiff testified that in the fall of 1902 the defendant told her she would have to give him up. Against this she at the time protested, and the subject was dropped, and the relations of the parties continued as before, with frequent protestations of love and affection by the defendant. This in general was the relation of the parties up to June 23, 1907, except that the defendant had not visited the plaintiff for seven or eight months prior to that date. For the purpose of such an action as this, a promise of marriage need not be proved in express terms, nor by direct evidence. We think the testimony in this case on that subject, though very meager indeed at this particular point, was nevertheless sufficient to warrant the jury in implying a promise of marriage as one of the artifices by which the alleged seduction was accomplished. The defendant testified as a witness in his own behalf. He confined his testimony wholly to the alleged act of October or November, 1906, and that of June 23, 1907. He did not deny that there had been a previous engagement of marriage, nor did he testify that it had ever been broken off. The testimony of the plaintiff was therefore abundant proof that an engagement of marriage had existed, and all the subsequent conduct of the parties tended at least to confirm the continuance of the same, notwithstanding that the defendant had once expressed a purpose to break it off.

IV. In stating the measure of damages the trial court instructed the jury that, if the plaintiff was entitled to recovery, she should be allowed such damages as "you find

under the testimony will fairly compensate her for . . .

4. **APPEAL: argument.** and loss of time, if any, caused thereby."

Appellant assails this instruction on the ground that there was no allegation of loss of time in the petition, and no evidence of such loss of time in the record. This point is made, but not argued in the opening argument. It is argued vigorously in the reply argument, and authorities are cited in support thereof. This method of reserving the citation of authorities for reply argument leaves us without assistance from the appellee in respect to such citations. Our rules are intended to prevent this method of argument.

The instruction complained of is in the form of the instructions considered in *Lamb v. Cedar Rapids*, 108 Iowa, 635; *Trumble v. Happy*, 114 Iowa, 626; *Vedder v. Delaney*, 122 Iowa, 589. Assuming, as con-

5. **SEDUCTION: damages: instruction.** tended by appellant, that there is no evidence

of loss of time, the point is ruled by the cases above cited, and the instruction in the form given must be deemed nonprejudicial as held in the cited cases. We do not overlook the cases cited by appellant in its reply brief, namely, *Gardner v. B., C. R. & N. R. R. Co.*, 68 Iowa, 588; *Reed v. C., R. I. & P. Ry. Co.*, 57 Iowa, 23; *Stafford v. Oskaloosa*, 57 Iowa, 748. The instructions under consideration in the foregoing cases were more rigid in form than that in the case at bar and than those considered in the later cases cited above. See, also, *Gray v. Bean*, 27 Iowa, 222, which is a case almost identical in its facts with the case at bar so far as they bear upon the question under consideration.

V. It is also urged vigorously by appellant in his reply argument that the trial court erred in permitting

6. **APPEAL: argument: objection to evidence.** the jury to allow for medical expenses and nursing on the alleged ground that no claim was made therefor in the petition, and that

there was no competent evidence of such expense. The

petition did claim specifically for this item. It was supported on the trial by the testimony of the nurse who testified to the amount of her bill and to the amount of the doctor bill as she heard the doctor state it to the plaintiff. It is urged that this latter testimony was incompetent, but no such objection was made at the time it was offered. Nor can the appellant be permitted to make this point in his reply argument. He made no claim of this kind in his opening argument as a part of his statement of facts that the nurse bill was \$40 and the doctor bill \$500. As claimed by counsel for appellee in his oral argument, he rested upon this statement of appellant to the extent that he filed no amended abstract, although there was in the record competent evidence on this subject which had been omitted from appellant's abstract. We mention this incident of the oral argument, not for the purpose of determining any issue raised thereby between counsel, but simply as illustrative of the reasonableness of our rule which requires the appellant to disclose in his opening argument every point relied on for reversal.

VI. Appellant's abstract does not show that any exceptions were taken to any of the instructions. This omission seems to have been overlooked, and appears to have been discovered only at the time of the oral argument. The appellant thereupon immediately after the submission of the case filed an amended abstract stating that exceptions were duly taken. This amendment is assailed by motion of appellee to strike the same. The motion to strike and appellant's resistance thereto have been submitted with the case. In the view we take of the case, we need not pass upon such motion. For the purpose of our consideration of the case, we have given appellant the benefit of his alleged exceptions to the instructions. There is also a controversy between parties as to whether a certain amendment to petition which was filed by plaintiff appellee in the court below immediately after judg-

ment should be considered. This amendment pleaded specifically "loss of time." In the view we have taken of the case, we have no occasion to deal with this question.

Other questions argued are so related to these which we have discussed that what we have already said is decisive of them all.

The judgment below must be *affirmed*.

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HUTTIG MANUFACTURING COMPANY, Appellant, v. CORA  
BURHANS.

**Mortgages: FORECLOSURE: SALE OF HOMESTEAD.** Where a mortgage  
1 covers both a homestead and other property of the mortgagor, the mortgagee may be required to exhaust the other property before resorting to the homestead. But if the other property has been subjected to prior liens and is not available to the mortgagee it has been exhausted, within the meaning of the statute and so far as the mortgagee is concerned, and he may then resort to the homestead.

**Same: REPRESENTATIONS OF MORTGAGEE.** The statement of a mort-  
2 gagee that the homestead, if included in the mortgage, would not be resorted to until the other property covered thereby had been exhausted, although made to induce the mortgagor to include the same in the mortgage was no more than a statement of what the law requires; but if the same could be construed as a promise on the part of the mortgagee it was complied with by a finding that the mortgage, so far as it covered other property, was fraudulent and void as to the mortgagor's creditors.

*Appeal from Des Moines District Court.*—HON. JAMES  
D. SMYTHE, Judge.

WEDNESDAY, OCTOBER 19, 1910.

ACTION to foreclose a mortgage on real estate given by D. Winter to plaintiff to secure the indebtedness to plaintiff of E. D. Winter & Co., for which the mortgagor

was liable as guarantor. The property described in the mortgage included the homestead of the mortgagor, and in this action it is asked that such homestead be subjected to the payment of the mortgage indebtedness. Prior to the commencement of action to foreclose the mortgage, D. Winter died, and his daughter, Cora Burhans, as testatrix, became vested with the legal title to the said homestead property. In the answer of the defendant, it was alleged that, to secure the execution of said mortgage, one Warner, an attorney acting for the plaintiff, represented to the mortgagor, for the purpose of inducing him to include in the mortgage the portion of his real property which constituted his homestead, that, if the homestead was so included, it would not and could not be touched until all the other property included in the mortgage other than the homestead should be sold and the proceeds applied to the satisfaction of the mortgage indebtedness, and that the property not constituting the homestead was not exhausted in the satisfaction of the mortgage debt and the plaintiff therefore had no right to maintain this action. The allegations of fact in the answer were supported by evidence, and the court rendered a decree for the defendant, denying any relief to the plaintiff. From this decree plaintiff appeals.—*Reversed*.

*Seerley & Clark and E. M. Warner, for appellant.*

*Power & Power and A. M. Antrobus, for appellee.*

McCLAIN, J.—Two reasons are assigned for appellee to sustain the action of the trial court in refusing to decree a foreclosure of the mortgage on the homestead: First, that under the statute (Code, section 2976) the homestead could be sold under a mortgage covering such homestead and other property “only for a deficiency remaining after exhausting all other property” covered by the mort-

gage; and, second, that the mortgagor was induced to execute the mortgage by a representation that, if the homestead was included in the mortgage, the plaintiff would first be required to exhaust the other property before resorting to the homestead.

Both these contentions are predicated on findings of the federal court in bankruptcy proceedings against E. D. Winter & Co. and D. Winter that the latter was liable for the debts of the former, that at the time the mortgage in question was given D. Winter was insolvent, and that plaintiff was chargeable with notice of that fact so that the mortgage recorded within four months prior to the institution of bankruptcy proceedings was fraudulent as to other creditors and void (*Huttig Mfg. Co. v. Edwards*, 160 Fed. 619, 87 C. C. A. 521), wherefore the property of D. Winter other than the homestead included within the mortgage was sold for the benefit of firm creditors, a portion of the amount realized being paid to plaintiff as such creditor on the indebtedness secured by the mortgage leaving about \$12,000 of said claim unsatisfied, for which amount plaintiff is attempting to foreclose the mortgage on the homestead.

I. Under the statutory provision above cited, plaintiff, having a mortgage covering the homestead and other property of the mortgagor, was bound to exhaust the other

1. MORTGAGES:  
foreclosure:  
sale of  
homestead.

property before resorting to the homestead, and the contention for the appellee is that it did not exhaust the other property, which was by the bankruptcy court found not to be subject to the mortgage on account of its invalidity under the bankruptcy law and was sold under the order of that court, the proceeds being applied to the satisfaction of the claims of the firm creditors, including the plaintiff. We find no authority, however, for giving the statutory language the interpretation thus sought to be placed upon it. It can not have been the intention of the Legislature, as we

think, to provide that, if the portion of the property other than the homestead included in the mortgage is found not to be available to the mortgagor under his mortgage for the satisfaction of his debt, his claim on the homestead is thereby defeated. When such property has been found not available to the mortgagor in the satisfaction of the mortgage indebtedness, then it is "exhausted" so far as the mortgagee is concerned. It can not reasonably be contended that, if the mortgagee finds that the property other than the homestead included within his mortgage is subject to prior liens which in fact exhaust it, he is thereby deprived of the benefit of his mortgage on the homestead. The statute does not provide that the other property must have been exhausted "for the payment of the debt" secured by the mortgage, but only that such other property pledged by the same contract for the payment of the debt shall have been exhausted. As a matter of fact, the property other than the homestead had been applied to the satisfaction of plaintiff's claim secured by the mortgage, but only *pro tanto* with the other claims which were unsecured, and we think that by filing its claim as a general creditor and taking its *pro rata* share of the proceeds of such other property the plaintiff had exhausted its remedy as to such property.

II. The contention for appellee that plaintiff has not complied with its promise made to the mortgagor as an inducement to the execution of the mortgage that the homestead would not be resorted to until all of the other property covered by the mortgage had been exhausted, is answered by the same course of reasoning as that above applied to the claim with reference to the interpretation of the statute. Plaintiff has exhausted its remedy as to other property. The promise was not that the value of the other property, without regard to whether such value could be made available to plaintiff in the satisfaction of his claim, should be deducted

2. SAME: representations of mortgagee.

from such claim before resort was had to the homestead, but only that under the law plaintiff would be first required to exhaust the other property, or that such other property must be exhausted before resort was had to the homestead. These statements made to the mortgagor as an inducement for including the homestead within the mortgage purported to be nothing but a statement of a rule of law. But, even if they are to be interpreted as statements of fact, they were true when made, and, if they could be interpreted as a promise, they have been complied with so that in no respect can appellee complain.

At the time the mortgage was executed, plaintiff had no knowledge that D. Winter was liable for the indebtedness of the firm of E. D. Winter. So far as plaintiff knew or was advised by D. Winter, the liability of the latter for the indebtedness of the firm was limited to plaintiff's claim, which D. Winter had expressly guaranteed. It is true that the bankruptcy court held, first, that D. Winter was liable for the indebtedness of the firm because it had been contracted in reliance on the representations expressly or impliedly sanctioned by D. Winter that he was a member of the firm; and, second, that plaintiff might have ascertained at the time it took its mortgage that D. Winter was so largely indebted as to render him insolvent. But it is not contended that the mortgage was taken by plaintiff in contemplation of the proceedings in bankruptcy which were subsequently instituted, nor, if such proceedings had not been instituted within four months after the recording of the mortgage, that such mortgage would have been invalid. It therefore appears that, when plaintiff took its mortgage, it was acting properly and solely for the purpose of securing its claim, and became obligated under the statute and under the representations made to the mortgagor to resort to the homestead only so far as its claim could not be satisfied by resort to the property not constituting the homestead. If such other property



is not and never has been available to the plaintiff for the satisfaction of that portion of its claim which it is now seeking to enforce as against the homestead, there is nothing in the statute nor in the representations and promises made for plaintiff when the mortgage was executed to defeat the rights which it is seeking to assert in this action.

For these reasons, the decree of the trial court is reversed.

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HENRY D. EVERINGHAM, Appellant, v. CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, Appellee.

**Assault by one servant upon another:** LIABILITY OF MASTER: EVIDENCE. The master is not liable for the assault made by one servant upon another where the same was not done in the prosecution of the master's business, but in order to effect some purpose of the party making the assault. In the instant case the evidence is held insufficient to show that the assault was committed in the prosecution of the master's business.

**Same:** RATIFICATION OF SERVANT'S ACT. Mere retention in his employment by the master of a servant who has committed an assault upon a fellow servant as the result of his own malice does not amount to a ratification of his act and render the master liable therefor.

**Same:** EVIDENCE OF REPUTATION. Where a servant of his own volition and to gratify his personal malice makes an assault upon a fellow servant, evidence of his reputation for quarrelsomeness is immaterial, in an action against the master for the assault. And the evidence sought to be offered in this action was objectionable because not confined to the servant's reputation in the community in which he lived.

**Same:** CONDUCT OF SERVANT: LIABILITY OF MASTER. The master can only be held responsible for the fidelity and good conduct of a servant while acting within the scope of his employment; he can not be held to warrant the servant's conduct in matters outside of the employment.

*Appeal from Lee District Court.*—HON. HENRY BANK, JR., Judge.

FRIDAY, OCTOBER 21, 1910.

ACTION to recover damages for an alleged assault made upon plaintiff by one of defendant's employees. Trial to a jury, directed verdict for defendant, and plaintiff appeals.—*Affirmed.*

*J. C. Hamilton and R. N. Johnson, for appellant.*

*H. H. Trimble, Palmer Trimble, and George B. Stewart, for appellee.*

DEEMER, C. J.—Plaintiff is the owner of an elevator in the town of Ft. Madison. A spur track from defendant's railroad leads to this elevator over defendant's own land. Cars for plaintiff's use were to be set out on this spur track, and, when loaded, shipped to the various consignees. He claims that he had very poor switching service, and that he complained thereof to defendant's general agent at Keokuk. William Tordt was defendant's switchman at Ft. Madison, having control of the cars which should be switched for use at plaintiff's elevator. Plaintiff claims that on August 15, 1908, he was delayed in getting cars ordered by him to the elevator, and that, by reason thereof, he had a number of men who were compelled to remain idle; that, while in this situation, Tordt came in with a switching crew upon the spur track to take out some empty cars, and it is shown that plaintiff while standing on the platform of his elevator or in a door leading into said elevator engaged in a wordy controversy with Tordt, who was then standing by some cars which were being moved by an engine attached thereto on this spur track. It seems that plaintiff had notified the Burlington office that he wanted some cars set on this spur track for his use, and that he also informed Tordt of his wishes in the matter. When Tordt got near to plaintiff and while

standing on the ground near the cars, he said to plaintiff: "Why in hell don't you leave a list of where you want your cars switched at the office, you God damn farmer, you." In response to this plaintiff said: "'I would about as soon be a God damn farmer as a damn fool switchman.' Tordt immediately climbed upon the platform, and hit me several times. He was standing a foot or two away at the time he hit me. I think I had my hands in my pockets. No further words passed between us. I can hardly tell where he hit me they came so fast. I was hit once in my right eye, once on the nose, and once on the side of my mouth and probably several other times, could not say exactly where. I did not strike at him. I turned around to protect myself, and Tordt jumped on my back, and continued to hit with one hand." Plaintiff also testified as follows: "Tordt, when he first addressed me, was either reaching to bleed the air out of the car, or else he had hold of the coupling irons. He had hold of the lever with his left hand. It was not the car next the engine. I don't know if he was at the front or rear end of the car. He was switching these cars. I was not anticipating trouble. Tordt was more than a switchman. He was the foreman. He was the man who gave orders. He had charge of the switching and had charge of the bills."

I. This is plaintiff's case as reproduced from his own testimony, and it is the strongest argument that could be made in support of the proposition that he has no cause of action against the defendant, although liability on the part of Tordt individually is clearly made out. It is fundamental that a master is not liable for all assaults made by his servant. It is only for such as are done in the prosecution of the master's business that the master is liable. If the servant steps aside from his master's business and in order to effect some

1. ASSAULT BY  
ONE SERVANT  
UPON AN-  
OTHER: lia-  
bility of mas-  
ter: evidence.

purpose of his own commits an assault, the master is not liable. This is clearly pointed out in the following cases already decided by this court: *Alsever v. Railroad*, 115 Iowa, 338; *Dougherty v. Railroad*, 137 Iowa, 257; *Kincaide v. Railroad*, 107 Iowa, 682; *Dolan v. Hubinger*, 109 Iowa, 408; *Porter v. Railroad*, 41 Iowa, 358; *Golden v. Neubrand*, 52 Iowa, 59; *Marion v. Railroad*, 59 Iowa, 428. In the latter case it is said: "The rule is that an employer is not liable for a willful injury done by an employee, though done while in the course of his employment, unless the employee's purpose was to serve his employer by the willful act. Where the employee is not acting within the course of his employment, the employer is not liable, even for the employee's negligence, and the mere purpose of the employee to serve his employer has no tendency to bring the act within the course of his employment." One of the best statements of the rule is found in *Cooley on Torts* (2d Ed.), 628, which reads as follows: "So if the conductor of a train of cars leaves his train to beat a personal enemy, or from mere wantonness to inflict an injury, the difference between his case and that in which the passenger is removed from the cars is obvious. The one trespass is the individual trespass of the conductor, which he has stepped aside from his employment to commit. The other is a trespass committed in the course of the employment, in the execution of orders the master has given, and apparently has the sanction of the master, and contemplates the furtherance of his interests. . . . The test of the master's responsibility is not the motive of the servant, but whether that which he did was something his employment contemplated and something which if he should do it lawfully he might do in the employer's name."

II. It is claimed that defendant ratified the assault by keeping Tordt in its employ, and not discharging him after the assault was made. That he was so kept is con-

ceded; but surely this can not be regarded as a ratification of a prior act not done in defendant's interest, for its benefit or by its authority either express or implied. No case so holds, and, if any such were to be found, we should not be disposed to follow it. From *Kwiechen v. Holmes*, 106 Minn. 148 (118 N. W. 668, 19 L. R. A. (N. S.) 255), we extract the following as announcing the true rule as to ratification: "But it is urged that the company became liable for the negligence of Spear because it retained him in its employ after it had knowledge of this accident. The authorities do not sustain this contention. When there is no original liability for the act of a servant, because at the time of the negligence the servant was acting in his own personal business, the master does not become liable merely by reason of the fact that he thereafter retains the servant in his employ. The rule contended for by appellant would seem to render an employer liable for every act of negligence of which he had knowledge which had been committed by the employee prior to the time when he employed him. The fact that an employee is retained after knowledge of a negligent act for which the master is already liable is sometimes important as bearing upon the right to recover exemplary damages, and this is evidently all the Wisconsin court intended to hold in *Cobb v. Simon*, 119 Wis. 597 (97 N. W. 276, 100 Am. St. Rep. 909). This appears with reasonable clearness from the final disposition of the case on a subsequent appeal (124 Wis. 467, 102 N. W. 891), and from the cases cited (*Bass v. Railway Co.*, 42 Wis. 654, 24 Am. Rep. 437).

III. Plaintiff offered to prove Tordt's reputation as to being a quarrelsome man, but the offered testimony was rejected. No charge of negligence in employing Tordt or in keeping him in defendant's service was charged in the petition, and no claim of liability on this ground is made. We

2. SAME: ratification of servant's act.

3. SAME: evidence of reputation.

say this notwithstanding a general allegation in the second count of the petition. These allegations are simply thrown in, and are not relied upon as being the proximate cause of the injury. However even if such allegations were present, we think there was no error on the part of the trial court in rejecting the offered testimony. Had the assault been upon a passenger, doubtless the testimony would have been admissible, but here, where Tordt clearly stepped aside from his employment to gratify some malice or spite, the testimony as to his reputation for quarrelsomeness was immaterial. Moreover, the trial court was justified in sustaining an objection to the question on account of its generality. In other words, the question did not call for his reputation in the community where he lived.

A master holds out his agent as competent and fit to be trusted, and thereby, in effect, warrants his fidelity and good conduct in all matters within the scope of his agency. Story on Bailments, sections 400, 406. But he does not and should not be held to warrant his servant's conduct in matters outside of the scope of that agency. In other words, he can not be held to be an insurer in matters not relating to the conduct of the master's business.

There is no error in the record, and the judgment must be, and it is, *affirmed*.

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MARTHA BARNETT, Appellee, v. FIRST NATIONAL BANK OF CHARITON, and J. H. JAMISON, Receiver, Appellant.

**Evidence:** TRANSACTIONS WITH A DECEDENT. The statute precluding evidence of a personal transaction between a witness and one since deceased does not apply to a mere agent of the real party in interest.

**Banks and banking:** ACTION FOR THE VALUE OF PROPERTY LEFT FOR SAFEKEEPING: EVIDENCE. In this action for the value of notes

left with a bank for safekeeping, a paper in the handwriting of the cashier, with whom the transaction was made but who died prior to the trial, and which was given plaintiff at the time of making a deposit of funds and one of the notes, and which showed that at that time plaintiff had in the bank cash and notes, was admissible in evidence as an admission, if not as a formal receipt, although not signed by the cashier.

**Same: ESTOPPEL.** The mere fact that plaintiff in this action had 3 stated to the receiver of the bank upon its insolvency, and to the comptroller of the currency, that the cashier was acting for plaintiff individually and not as agent for the bank and was advised that plaintiff was not entitled to file her claim against the bank, did not amount to an estoppel of the right to so assert the claim, where it was not shown that the receiver changed his course or relied upon the statement.

**Same: EVIDENCE: SUFFICIENCY.** The showing of a deposit of the 4 notes and money and failure of the bank or its managing officer to return the same made a *prima facie* case, and established a liability therefor, in the absence of a showing of loss thereof not the result of defendant's negligence, regardless of the question of care required.

*Appeal from Lucas District Court.*—HON. M. A. ROBERTS,  
Judge.

MONDAY, OCTOBER 24, 1910.

ACTION to recover the value of some notes left by plaintiff with the First National Bank of Chariton for safe-keeping. Defendant filed a general denial and also pleaded an estoppel. On the issues joined the case was tried to the court, resulting in finding for plaintiff and establishing her claim against the receiver. Defendant receiver appeals.—*Affirmed.*

O. A. and L. B. Bartholomew, for appellant.

W. W. Bulman, for appellee.

DEEMER, C. J.—Plaintiff claims to have left certain

notes for safe-keeping with the First National Bank of Chariton, the business being done by one Crocker, the cashier; that the bank failed, and her notes have never been returned to her, although demand has been made therefor. Defendant denies the deposit of the notes, says the transaction, if there was one, was between plaintiff and Crocker individually, and further pleads an estoppel, which plea will hereafter be noticed.

I. Save for a ruling on evidence, the questions presented by this appeal are purely of fact. The ruling complained of is the action of the trial court in permitting plaintiff to testify to transactions with the cashier of the bank, one F. R. Crocker, who at the time of trial was deceased. The so-called "dead man's statute" does not apply to one who was a mere agent of the real party in interest. This has been held in many cases, and nowhere more squarely than in *Reynolds v. Iowa & Neb. Co.*, 80 Iowa, 563; *Bellows v. Litchfield*, 83 Iowa, 36; *Salyers v. Monroe*, 104 Iowa, 75; *French v. French*, 84 Iowa, 658. The evidence clearly shows that plaintiff dealt with Crocker as cashier of the bank, and he, Crocker, was not jointly liable with his bank, as defendant contends. The testimony was properly received.

II. While the testimony is not as convincing as it might be, due to plaintiff's age and her manner of doing business, we think it sufficient to sustain the action of the trial court in allowing plaintiff's claim. We shall not set it out. The most significant thing in the whole case is a piece of paper in Crocker's own handwriting given to plaintiff at the time she made the last deposit of notes and received some cash from Crocker for her personal needs. This piece of paper shows that at the time it was given plaintiff had in the bank in cash and notes \$2,176.42. This paper, although not signed by Crocker,

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was shown to be in his handwriting, and it was admissible in evidence as an admission, if not a formal receipt.

III. It is claimed by defendant that plaintiff received back her notes from the receiver of the bank. This is an affirmative defense not sustained by the record, and the trial court was right in ignoring it.

IV. The plea of estoppel is based upon a claim made by plaintiff before this action was commenced to the receiver of the bank and the comptroller of the currency to the effect that Crocker was acting for her individually, and not as agent for his bank. Responding to this claim, the comptroller advised plaintiff that she was not entitled to file her claim against the bank. This is all there is to the plea of estoppel, and it is apparent that many of the essential elements of an estoppel are wanting. There is no testimony that the receiver changed his course or did anything in reliance upon plaintiff's statements. Indeed, the record leaves us in doubt as to whether or not any such statements were made.

V. Lastly, it is argued that the testimony shows a gratuitous bailment, and that no negligence on the part of the bank or its cashier is shown. We do not find it necessary to determine this question. Plaintiff showed the deposit of the notes and money, and the failure of the bank, its cashier or receiver, to return them. This made a *prima facie* case, and defendants were liable in the absence of a further showing of loss through no negligence of the bailees. It is immaterial under such circumstances whether the degree of care be high, ordinary, or slight. Enough was shown to make out a *prima facie* case of conversion, and this is all the case required.

The judgment is right, and it is *affirmed*.

3. SAME: estoppel.

4. SAME: evidence: sufficiency.

THE STATE OF IOWA on the Relation of CHESTER A.  
BARKER and others, Appellee, v. R. E. MEEK.

**Counties: REMOVAL OF OFFICERS: WILFUL MISCONDUCT: GOOD FAITH**  
**1 OF OFFICER: EVIDENCE: SUBMISSION OF ISSUE.** The term wilful misconduct in office, as used in the statute providing that any county officer may be removed for wilful misconduct or maladministration in office, is not applicable to every case of misconduct, nor to every mistake or departure from the strict letter of the law; but only to wilful wrongs, or omissions on the part of such officer. So that the question of the good faith and innocence of intentional wrong becomes important, and evidence upon that question is admissible.

In this action it appeared that defendant, a county treasurer, received payment of taxes after the close of the semiannual tax-paying period, without exacting the penalty for delayed payment, in accordance with the long established custom and believing the practice to be legal. There was no corrupt agreement of any kind between him and the taxpayers and he received no profit from the transaction. *Held*, that the wilfulness of defendant's act, if wrongful, was a question for the jury, and a judgment of ouster should not have been entered by the court without a submission of the issue.

**Same.** While the statutes seem to contemplate that every taxpayer  
**2** shall appear in person at the office of the treasurer and pay his taxes, still a treasurer is not to be condemned for wilful misconduct in accepting payment of taxes, as if made to him in person, when transmitted by check or collected and paid through local banks, even though there may be a delay of a few days in completing the actual transmission of the money.  
LADD, J., and DEEMER, C. J., dissenting.

*Appeal from Van Buren District Court.*—HON. D. M.  
ANDERSON, Judge.

MONDAY, OCTOBER 24, 1910.

**ACTION** to remove defendant from office as county

treasurer. There was a directed verdict of guilty, on which judgment of removal was entered, and defendant appeals.—*Reversed.*

*Walker & McBeth* and *Mitchell & Hunter*, for appellant.

*Felix T. Hughes, William McNett, and E. L. McCoid*, for appellee.

WEAVER, J.—The defendant being the duly elected and acting treasurer of Van Buren County, this action was brought upon the complaint of certain citizens of said county to remove him from office. The proceeding was instituted under Code, section 1251, which provides that any county officer may be removed for “willful misconduct or maladministration in office.” The action thus provided for is one at law and triable to a jury. The petition of the plaintiffs charged many alleged acts of misconduct and maladministration, but, upon the hearing, they were all dismissed by the trial court as having no support in the evidence except the one specification hereinafter more particularly stated, and upon this specification a verdict of guilty was directed by the court and judgment of removal entered. From this judgment the defendant appeals.

The allegation of willful misconduct in office which is relied upon to sustain the action of the trial court is based upon the fact that after the close of the semiannual tax-paying period ending September 30, 1907, the appellant continued for several days to accept payment of taxes without exacting or collecting the penalty which the statute imposes. On the trial the appellant freely admitted that from September 30th to noon of October 8th of the year above mentioned he did receive the taxes of all such taxpayers as appeared for that purpose, and receipted for the same as if paid on the former date. Viewing this admission as de-

cisive of the case, the court excluded all evidence tending to show good faith and absence of evil motive on appellant's part, and peremptorily directed a verdict of guilty, but suspended execution of the order of removal pending an appeal to this court.

The sole question presented is whether the acts thus freely admitted constitute "willful misconduct in office" within the meaning of the statute. What is the meaning

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of "willful misconduct" as that phrase is here employed? Manifestly it is not applicable to every case of misconduct, nor to every mistake, or every departure from the strict letter of the law defining the officer's duties, but only to willful wrongs or omissions on

his part. The word "willful," like most other words in our language, is of somewhat varied signification according to its context and the nature of the subject under discussion or treatment. Frequently it is used as nearly or quite synonymous with "voluntary" or "intentional," and evidently this is the interpretation given it by the trial court in the case before us. But when employed in statutes, especially in statutes of a penal character, it is held with but few exceptions to imply an evil or corrupt motive or intent. In *State v. Willing*, 129 Iowa, 72, this court has said: "Every voluntary act of a human being is intentional, but, generally speaking, a voluntary act becomes willful in law only when it involves some degree of conscious wrong or evil purpose upon part of the actor, or at least an inexcusable carelessness on his part whether the act be right or wrong." So, also, the New York court: "The word 'willful' in a statute means something more than a voluntary act, and more also than an intentional act when it is in fact wrongful. It includes the idea of an act intentionally done with a wrongful purpose or with a design to injure another or one committed out of mere wantonness or lawlessness." *Wass v. Stephens*, 128

N. Y. 123 (28 N. E. 21). Speaking for the Supreme Court of Wisconsin, Chief Justice Dixon thus states the rule: "While the word 'willful' is sometimes so reduced or modified as to mean little more than plain 'intentionally' or 'designedly,' such is not its ordinary signification when used in criminal law and penal statutes. It is there most frequently understood, not in so mild a sense, but as conveying the idea of legal malice in a greater or less degree; that is as implying an evil intent without justifiable excuse." *State v. Preston*, 34 Wis. 675. The eminent Chief Justice Shaw puts it in these words: "'Willful' as used in statutes means not merely voluntary, but with a bad purpose." *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 220. "Willful disobedience" has been defined as "something more than a conscious failure to obey. It involves a wrongful or perverse disposition." *Shaver v. Ingham*, 58 Mich. 654 (26 N. W. 162, 55 Am. Rep. 712). Conduct may be voluntary, thoughtless, or even reckless, yet not necessarily willful. *Harrison v. State*, 37 Ala. 154. Nor does unlawfulness necessarily imply willfulness. *Wass v. Stephens*, *supra*; *Yeamans v. Nichols* (City Ct. N. Y.) 81 N. Y. Supp. 500. A statute of the United States regulating the business of distilling spirits provides a penalty for willful omission or neglect to observe the provisions of the revenue law. In *Felton v. United States*, 96 U. S. 699 (24 L. Ed. 875), a civil action was begun against Felton to recover the prescribed penalty. On the trial he requested the court to charge the jury that, if the acts charged were done in good faith, he was not liable upon the charge preferred. This request was refused, and the jury was told that, if the accused had designedly done the prohibited act, he was guilty as charged. On appeal this instruction was held erroneous. Chief Justice Fuller, delivering the opinion, says: "Doing or omitting to do a thing knowingly and willfully implies, not only knowledge of the thing, but a determination with a bad intent to

do it or to omit doing it. . . . All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of everyone." In *Evans v. United States*, 153 U. S. 584 (14 Sup. Ct. 934, 38 L. Ed. 830), construing a statute against the willful misapplication of the bank funds, the court says: "The allegation of the intent to defraud becomes material in the highest degree. In fact, the gravamen of the offense consists in the evil design with which the misapplication is made." The case of *Potter v. United States*, 155 U. S. 438 (15 Sup. Ct. 144, 39 L. Ed. 214), has reference to a statute forbidding the certification of a check by any national bank where the drawer has no funds on deposit with which to pay it. The defendant being charged with a willful violation of this act, the fact of the alleged certification for a person not having the required deposit was admitted, and, when the accused offered to prove facts tending to show that the act was done in good faith and without evil intent, the testimony was excluded. This ruling was held erroneous, and the judgment against the bank officer reversed. Speaking of the effect and meaning of the word "willful" in the statute, the court says it is not mere surplusage. "It means something. It implies on the part of the officer knowledge and a purpose to do wrong. Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact, or without any purpose to evade or disobey the mandates of the law." In a similar case—*Spurr v. United States*, 174 U. S. 728 (19 Sup. Ct. 812, 43 L. Ed. 1150)—these holdings were again approved and followed; the court saying: "While it is true that care must be taken not to weaken the wholesome provisions of the statutes designed to protect depositors and stockholders against the wrongdoings of banking officials, it is of equal importance that they should not be so construed as to make transactions

of such officials, carried on with the utmost honesty and in the sincere belief that no wrong was being done, criminal offenses, and subjecting them to severe punishments which may be imposed under those statutes. The wrongful intent is the essence of the crime." Indeed, the authorities upholding this view are too numerous to mention, and we take time to quote from leading cases thereon only because of the grossly unjust results which would follow our establishment of a precedent to the contrary. True, there are exceptional cases where the courts have held willfulness to be established by proof of the voluntary character of the act, but such of these cases as are not explainable from the peculiar circumstances under discussion or the peculiar language of the statute there being construed are opposed to the overwhelming weight of authority.

Thus far we have considered the use of the word "willful" in statutes of a penal character generally. Let us see now how the word is construed by the courts with reference to official misconduct. A statute of New York provides that a person who having served as an executive or administrative officer willfully exercises any of the function of his office after his right to do so has ceased, or willfully intrudes himself into an office to which he has not been duly elected, incurs a penalty as for a misdemeanor. A defendant being prosecuted under this act, the trial court charged the jury that, if defendant intended to do what he did do, then his act was willful within the meaning of the law, and this was held erroneous, in that "willfully" in the statute means more than voluntarily or intentionally—"it includes the idea of an act intentionally done with a wrongful purpose, or with design to injure another, or one committed out of mere wantonness or lawlessness." *People v. Bates*, 79 Hun, 584 (29 N. Y. Supp. 894). Under a Missouri statute providing a penalty for willful wrongs done under color of office, a justice of the peace was indicted, tried, and convicted. On

appeal the conviction was set aside, the court saying that the word "willful" must be restricted to such acts as are done with evil intent and without reasonable grounds to believe that the act was lawful. *State v. Grassle*, 74 Mo. App. 316.

In *Geddes v. Township*, 46 Mich. 316 (9 N. W. 431), the Michigan court denied the appeal of a school director from an order removing him from office for alleged misconduct; it appearing that the director offered no evidence in defense or in explanation of his conduct which was such as "might be regarded as willful and proceeding from some motive beyond a desire to do his duty." In *Triplett v. Munter*, 50 Cal. 644, action was brought to remove an officer for charging and collecting illegal fees, and the court there says the statute in question is highly penal in character, and, though it does not in terms require that the wrongful act must have been knowingly and corruptly done, it must be held that it is not intended to visit such result upon the officer unless the act was willful or corrupt. In *Smith v. Ling*, 68 Cal. 324 (9 Pac. 171), a petition for the removal of an officer is held fatally defective if it fails to allege that the unlawful act charged was knowingly, willfully, and corruptly done. In *State v. Alcorn*, 78 Tex. 387 (14 S. W. 663), it was sought to remove a county officer for willful violation of duty, and the court, refusing to enforce the forfeiture, says: "We are of the opinion that under the statute an act done or omitted can not be said to have been willful unless the officer believed it was his duty to do or omit the act and with such knowledge or belief obstinately, perversely, and, with intent to do wrong, acted or failed to act. . . . The statute is one penal in character, and must be construed as though it were one defining a crime and prescribing its punishment. If respondent violated an official duty whether it resulted from a willful act or not, he would be responsible to any person injured thereby, for the intent with which the act



was accompanied would not be a matter of inquiry, but, when it is sought to remove him on account of official misconduct, *animus* becomes an important inquiry." In *State v. Scates*, 43 Kan. 330 (23 Pac. 479), an action to remove an officer, the decision concludes: "As a majority of the court do not find that any of the acts done by Scates were done corruptly, judgment will be rendered in his favor." In a similar proceeding in Louisiana a like conclusion was reached on the express ground that: "No corrupt motive is imputed in connection with these acts, and, at best, they do not show such neglect or inefficiency as to authorize the deprivation of his office." *State v. Bourgeois*, 47 La. Ann. 184 (16 South. 655), and same case in 45 La. Ann. 1350 (14 South. 28). In Idaho it was held that, although the acts charged were illegal, yet the officer "acted honestly and without intent to defraud the county," and was not therefore liable to removal. *Ponting v. Isaman*, 7 Idaho, 581 (65 Pac. 434). In *State v. Hoglan*, 64 Ohio St. 532 (60 N. E. 627), the defendant, a city officer sought to be removed, justified his action under a certain statute, and the court ruled that, although his construction was wrong and he had failed to perform the duty required of him, he was not necessarily removable on that account, saying: "Such errors frequently arise in the performance of their duties by public officers, and it has not hitherto been regarded as an evidence of such incompetency as to require that they should be removed." Speaking of the general nature and effect of a statute permitting the removal of a public officer, the New York Court of Appeals, while conceding the necessity of prompt and drastic action "in cases of established inefficiency or corruption," also say: "The public interests do not require action which shall be unjust to a worthy officer or which will unfairly besmirch a good character." *State v. Sullivan*, 58 Ohio St. 504 (51 N. E. 50, 65 Am. St. Rep. 781). Approaching the subject from still another angle, the

Michigan court has said: "The right to hold this office is just as sacred in the eyes of the law to Metevier (the accused) as the right to hold the property he has earned. It is a property right, and one of which he can be divested only by a strict conformity to the statute. . . . The people of the county have rights also as well as the accused. They have the right under the Constitution to elect their county officers and have such officers serve out the terms for which they were elected. It was not contemplated by the Constitution that such officers should be removed but for grave reasons." *People v. Therrien*, 80 Mich. 187 (45 N. W. 80).

We have not sought to trace this line of adjudication through all the states, but we have followed it far enough to show that the clear trend of the cases is opposed to the position taken by the trial court, and that, when willfulness is charged as a ground for removing an officer from his office, his good faith and innocence of intentional wrong is a question upon which he is entitled to be heard in evidence, and that the truth of such charge is for the jury, and not for arbitrary disposition by the court. The only case cited and the only one developed by the research of counsel which seems to hold that the court may peremptorily order a verdict of guilty in such cases is *Skeen v. Paine*, 32 Utah, 295 (90 Pac. 440). In that state the statute provides that, upon being found guilty of charging and collecting illegal fees, the court must enter judgment removing the accused officer from his position. Rev. St. Utah, 1898, section 4580. The statute does not provide that the illegal exaction must be willful to justify the conviction. The defendant in the cited case was a member of a city council whose legal compensation was limited to \$240 per year, but, acting with other members, he charged and received greatly increased compensation for official services. Upon the admitted facts, the court upheld a directed verdict against him. Without

discussing the merits of such holding as a matter of principle, the difference in the statutes being enforced is sufficient to distinguish this authority from those we have before cited. It has no bearing whatever upon the proper interpretation of the word "willful" as employed in the present instance. If it be admitted, as argued, that the primary purpose of the statute is the protection of public interests, it may well be said that those interests are not imperiled by acts of a trifling or unimportant character occasioning no injury against which the personal responsibility and official bond of the incumbent do not afford undoubted security. Such peril arises only when his administration of the office is marked by such grave misconduct or such flagrant incompetency as demonstrates his unfitness for the position. That this is the controlling idea of the statute we ourselves have decided. In *State v. Welsh*, 109 Iowa, 21 (79 N. W. 369), speaking by Ladd, J., we said: "The very object of this statute is to rid the community of a corrupt, incapable, or unworthy official." From this exposition of the legislative intent we are not inclined to depart. "The object designed to be reached by a statute must limit and control the literal import of the terms and phrases employed." *State v. Clark*, 29 N. J. Law, 99; 1 Kent's Comm. 462; *Commonwealth v. Kimball*, 24 Pick. (Mass.) 370 (35 Am. Dec. 326); *United States v. Fisher*, 2 Cranch, 358 (2 L. Ed. 304). And see *Cushing v. Winterest*, 144 Iowa, 260; lately decided by us.

Such being the law, let us revert as briefly as may be to the facts to which it is to be here applied. In the discharge of his official duties the defendant was allowed the assistance of a single deputy. This limited force, however sufficient it may have been to perform the ordinary work of the office, was wholly insufficient to attend each day to the increased applications to pay taxes which marked the close of the semiannual tax-paying period provided for by statute. The appellant's duty in collecting taxes was

not confined to the simple receiving of the money due. He was required to issue formal and specific receipts to each individual, to register these receipts in books kept for that purpose, to distribute each payment among the numerous funds to which it belonged, and make accurate and detailed entries thereof in the records and accounts of the office, and, so far as possible, to make each day's record a complete and distinct history of that day's business. When, therefore, on September 30, 1907, the closing day for the payment of the annual tax without added penalty, the office was deluged with hundreds of demands for tax receipts, it was manifestly impossible for appellant and his deputy to meet these demands, receive the taxes, issue the receipts, and complete the record thereof in one short day. As a matter of fact, working with all reasonable diligence and working overtime, they did not succeed in closing the books for September until about noon of October 8th, during which interval, following the usage and custom of the office established long prior to his incumbency, and believing he could rightfully do so, appellant treated the last day of September as still continuing, and, until the accounts for that month were complete, accepted taxes without penalty from such taxpayers as applied to make payment, and receipted for the same under date of September 30th.

There was no corrupt agreement of any kind between him and any of these taxpayers. He received no profit from these transactions, and, indeed, it does not appear that any of the persons paying taxes during this interval made any demand or request concerning the penalties, but he, following, as he offered to show, the practical construction which had been placed upon his statutory duties in the conduct of the office for a period of thirty years, treated the official day of September 30th as closing with the closing of that day's accounts. There is not in the record the slightest suggestion of evil motive on his part. If

his act was a mistake, the uncollected penalties aggregated at most an insignificant sum, against the loss of which the county was protected by a bond of \$100,000. No other charge of wrongdoing is supported by any evidence. There is no suggestion that appellant is not in every way competent to fill the office and discharge its duties with efficiency. So far as this case reveals, his personal character stands unimpeached, and his official record is without stain of corruption. To say that such an officer is to be removed in disgrace from the office to which he has been elected by the county in order to vindicate a law, the object of which is as we have said to "rid the community of corrupt, incapable, and unworthy officials," is to sanction a shocking injustice. To so hold is to put it in the power of any envious or maliciously inclined person to endanger the incumbency and heap undeserved reproach upon the most capable and conscientious officer in the public service. It is not given to any man to be absolutely perfect in the discharge of all duty. There is no man in official position so letter perfect in the law that he does not at some point by act or omission or misconstruction of the law, though with perfect integrity of motive, fall short of the strict statutory measure of his official duty. That such technical violations against which an ordinary civil action in damages affords a complete remedy should be classed as impeachable offenses calling for the removal of an officer is intolerable. Our statute books are full of provisions requiring county, city, and township officers to do certain acts at or within a specified time. For instance, the clerk of the district court must report the criminal statistics of his county to the Secretary of State on the first Monday in November in each year. Suppose the clerk to be so delayed by the pressure of other official work that his report is not filed until a day or two after that date has passed, is he guilty of willful misconduct in office? The county auditor is required to make report of

certain expenses to the clerk of the district court on October 15th of each year. Suppose that, acting in good faith, he fails to present his report until October 16th, and when he appears for that purpose the clerk says to him, "I have not yet closed my books and accounts of yesterday's business, and will file your report as of that date," and, this being done without any wrongful motive and in the belief that they could rightfully do so, are they both chargeable with willful misconduct? Or if an assessor in the honest, but mistaken, belief that certain property is not taxable, omits it from his roll, is he therefore and as a matter of law subject to removal from his office?

Nor is the force of this illustration avoided by the contention that such statutes are directory only while the statute adding penalties to delinquent taxes is mandatory. To decree that a statute is directory gives no license for its willful violation, and, if a county treasurer is to be conclusively held guilty of a willful violation of duty subjecting him to a removal from office for every voluntary act or omission for which we may find no warrant in the statute, no matter how clear his honesty of purpose or how manifest his competency for the position, or how perfectly the public is protected against injury or loss by his technical error, then there is no place or point to draw the line in the administration of any office short of absolutely perfect observance of the statute, not merely as it apparently reads, but as the court in its wisdom, or lack of it, may construe it to read. If the contention of appellee is right, the appellant's acceptance of a single payment of taxes without added penalty after the close of the calendar day of September 30th was an impeachable offense. According to this rigid standard of duty, had appellant and his deputy in their zeal to serve the waiting crowd kept the treasurer's office open until after midnight of that day, every tax so accepted after the stroke of twelve was a willful violation of law calling for his ignominious expulsion

from his position. In our judgment the law calls for no such injustice. The extension of the business or official day beyond the calendar day is a practice of ancient and by no means disreputable origin, and it is not necessarily unlawful, or, if unlawful, it is not necessarily willful. The essential inquiry is whether the record shows the appellant conclusively and as a matter of law guilty of such willful misconduct in office that public interests require his removal. In our opinion no such showing has been made. The willfulness of the act, if wrongful, was a question of fact which the court could not rightfully withdraw from the jury.

Another feature of the case demands our notice. Originally it seems to have been the theory of the lawmakers that each property owner would appear in person at the treasurer's office, and there make payment

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of his taxes in actual cash. See Code, section 1403. It is not too much to say that literal compliance with this provision if ever practicable has for many years ceased to be so. But a small percentage of the people appear in person to pay their taxes, and a very large proportion do not pay in cash, but by check or other recognized substitutes for legal tender currency. Every county has scattered within its borders cities, towns, and hamlets in each of which one or more banks serve as mediums through which payments are made to the county treasurer. Each bank is supplied or supplies itself with a list of the taxes due from the people of its neighborhood, and serves its customers by receiving their payments and ordering the proper receipts from the treasurer. Naturally the average taxpayer postpones payment till the close of the period is at hand, and the treasurer then finds himself required to deal not only with a flood of applications made directly to him at his office, but with a still greater quantity which come to him by mail, telephone, or telegraph from the banks. Where the orders come in within the proper time, if they

are from banks with whose responsibility the treasurer is satisfied, he accepts the payment as if made to him in person, even though there be a delay of a day or a few days in completing the actual transmission of the money from the vaults of the bank to the vaults of the treasury. To condemn this long-settled practice as willful misconduct is to brand practically every county treasurer in Iowa as subject to removal from office. We do not suggest for a moment that the treasurer by this use of the banks relieves himself from the strictest personal responsibility for every dollar of such taxes, but we do insist that, while holding him to such rigid liability, he should be left free to conduct the business of his office according to convenient, modern, and improved methods without exposing himself to impeachment for willful or corrupt maladministration.

A new trial must be ordered, and the judgment appealed from is therefore *reversed*.

LADD, J. (dissenting).—The foregoing opinion in effect holds that the conscious intentional disregard of official duty is not ground for removal from office unless there also be proven in addition thereto, an evil or corrupt motive. To this I can not yield assent. Nor do I think the authorities cited go to such limit. Moreover, the statement that defendant was not allowed to show good faith on his part is not borne out by the record. Counsel did make a formal offer to show that for the past thirty years depository banks habitually had ordered tax receipts up to and including the last day of September of each year, crediting the treasurer with the amounts without penalties which uniformly had been accepted by the treasurer. The trouble was this did not meet the cases made against him. No distinction was made between persons for whom tax receipts had been ordered on or prior to September 30th and those who first applied to pay their taxes several days later. It may and often does happen that the treasurer is so pressed with demands that he necessarily must postpone a portion



of the work of making out tax receipts for several days, and, this being without fault of the taxpayer, the imposition of a penalty might be unjust. But, where the application to pay and for the receipt is after the penalty has attached, the treasurer is without excuse if he purposely omit to collect with knowledge that the law requires him to do so and misdates the receipt contrary to statutory mandate, so as to make it appear that none was owing. Pressure of time or difficulties in bookkeeping will hardly excuse the conscious ignoring of a mandatory provision of the statute, especially when in the orderly course of business the entries of payments and preparation of receipts might well have proceeded in the order in which applications for payment were made. As county treasurer, it was defendant's duty to "receive all money payable to the county." On the other hand, it was the duty of every person "subject to taxation to attend at the office of the treasurer" and pay one-half of his taxes before April 1st and the other half before October 1st of each year. Section 1403, Code. "If the first installment of taxes shall not be paid by April 1st the whole shall become due and draw interest as a penalty of one percent per month until paid, from the first of March following the levy; and if the first half shall be paid when due, and the last half shall not be paid before October 1st following such levy, then a like interest shall be charged from the date such last half became delinquent; and the tax with all the penalties shall be collected at the same time and in the same manner." Section 1413, Code. "The treasurer shall in all cases make out and deliver to the taxpayer a receipt, stating the time of payment, the description and assessed value of each parcel of land, and the assessed value of personal property, the amount of each kind of tax, the interest on each and costs, if any, giving a separate receipt for each year; and he shall make the proper entry of such payments on the books of his office." Section 1405, Code.

The delinquencies charged and proven were that defendant received payment of the last half of taxes payable in 1907 after September 30th and up till about noon of October 8th of that year from sixty-five different persons without adding the penalty fixed by the above statute, and, in violation thereof, dated the receipt to each back to September 30th, thereby concealing the loss to the county in omitting to collect penalties. Some payments of taxes were made into banks on September 30th of which the treasurer was not advised until the following day, and besides these about three hundred and twenty-five individuals paid after that date without the penalties being added, and the dates of the receipts and record were falsified as stated. The excuse offered for disregarding the explicit provisions of the law is that to have exacted penalties and correctly dated the receipts and the book entries would have disarranged and confused the books of the office. How this would have resulted is not clear. If because of pressure of business all receipts for taxes for which remittances had been received or tendered or payments offered to be made prior to October 1st could not have been sent out before that date, this furnished no excuse for including remittances received on that day or those following concerning which there had been no tender or offer of payment without adding penalties as provided by law or for falsely dating the receipts and entries of these subsequent payments. Banks, even though designated by the board of supervisors as depositaries, are not agents of the treasurer for the collection of taxes, but in forwarding to him act solely in behalf of the taxpayer. To avoid the penalty of delinquency there must be actual payment to the treasurer or offer of such payment or the deposit of the money for the payment of specific taxes to his credit and with the approval express or implied in a designated depository within the time prescribed in the statute quoted. But there was no room for construction in the case at bar. There

was no misapprehension of the facts nor misconception of the law. On the trial defendant admitted that he knew that the statute imposed on him the duty of exacting the penalty of one percent on all payments received after September 30th, and to date the tax receipts and entries in his books as of the day payments were made. Section 1463 of the Code declares that: "If any auditor or treasurer or other official shall neglect or refuse to perform any act or duties specifically required of him, such officer shall be guilty of a misdemeanor." Could a treasurer's duties be more specifically stated than in the statute quoted?

Several courts have experienced much difficulty in determining whether a technical disregard of the law honestly made where the law is uncertain will furnish ground for removal from office. *Ponting v. Isaman*, 7 Idaho, 581 (65 Pac. 434); *State v. Scates*, 43 Kan. 330 (23 Pac. 479); *State v. Bourgeois*, 47 La. Ann. 184 (16 South. 655); 29 Cyc. 1410. But when the law is unmistakable and the officer acts in plain violation of its express mandate, or omits to do that which it clearly commands, there should be no hesitancy in denouncing such act or omission as "willful." In such a case the evil motive if essential is to be implied. Thus in *State v. Teeters*, 97 Iowa, 458, the charge was that defendant had willfully obstructed the highway, and "willfully" as used in the statute was held to be synonymous with "intentionally," while in *Parker v. Parker*, 102 Iowa, 500, "willful" in the statute punishing trespass in cutting growing timber was held to involve an evil purpose. But one might cut growing timber supposing he rightly could do so, as under the belief it was dead, as was pointed out; while one who places an obstruction in the highway knowing it to be such is without excuse, for the law expressly prohibits the act. In *State v. Sayre*, 129 Iowa, 122, "willful" in a statute denouncing a penalty against an elector who shall willfully vote in a precinct other than that of his residence was held to involve either

knowledge of disqualification or a reckless disregard of whether disqualified or not, and attention was directed to the distinction between ignorance of law as affecting the purpose with which an act might be done and ignorance of fact. In *Parker v. Parker*, *supra*, we said that the word when found in penal statutes meant, not only "intentionally or deliberately done, but with a bad or evil purpose as in violation of law . . . or contrary to a known duty." Where an act exacted by the law of a public official is consciously omitted or an act is consciously performed by a public official which is prohibited by law, his conduct should be presumed to have been with an improper purpose as it is inimical to the public good, and is to be regarded willful as a matter of law. *Coffey v. Superior Court of Sacramento Co.*, 147 Cal. 525 (82 Pac. 75); *Odin Coal Co. v. Denman*, 185 Ill. 413 (57 N. E. 192, 76 Am. St. Rep. 45); *State v. King*, 86 N. C. 603; *U. S. v. Three Railroad Cars*, 28 Fed. Cas. 144; *U. S. v. Houghton* (D. C.) 14 Fed. 544; *State v. Perry*, 109 Iowa, 353. In Nebraska, where the causes of removal are in substance like those of this state, in an action to remove a surveyor for changing government corners, proof that this was knowingly done was held sufficient. See *Bradford v. Territory*, 2 Okl. 228 (37 Pac. 1061); *State v. Welsh*, 109 Iowa, 19. Moreover, the statute in this state is not strictly penal in character. It is essentially remedial and protective. Its purpose is not the award of compensation for injury, nor the recovery of a penalty, nor the infliction of punishment upon the wrongdoer, but to shut off all opportunity for farther transgressions. The language employed in *State v. Leach*, 60 Me. 58 (11 Am. Rep. 172), where the accused as register of deeds was charged with issuing a false certificate, and the statute authorized removal if found guilty of misconduct in office or incapable of discharging its duties, is pertinent: "It is to be observed, in the first place, that this section is

not one providing for the punishment of the individual offender by fine or imprisonment for an offense against its provisions. It is not in that sense a strictly penal statute. It is rather in the nature of an inquest of office, and the consequences of a conviction under it reach only to the possession of the office and its emoluments. It seems more like the substitution of the court for the Legislature when acting by impeachment as provided in the section of the Constitution before alluded to. These distinctions may be of some importance in giving a construction to the statute and in determining the limits to be given to the language used. . . . There is a manifest distinction between a case of misconduct resulting in loss of office only, and the charge of a legal crime, which requires proof of criminal intent before conviction and punishment of the person by fine or imprisonment after conviction. In the latter, there must be a direct charge in the indictment of the criminal intent and criminal act. Misconduct does not necessarily imply corruption or criminal intent. We think the Legislature used the word in its more extended and liberal sense. This statute is not, strictly speaking, a penal statute, but rather remedial and protective." See *Shaw v. Macon*, 21 Ga. 280. For these reasons, doubtless the proceedings for removal are civil, not criminal, as in many of the other states. Section 1251 of the Code permits any resident of the county of which defendant was treasurer to make complaint by petition in the name of the state, and section 1254 provides that "the charges when filed shall be tried as a law action and all the proceedings shall as nearly as may be conform to the rules governing the trial of such actions." And, where the evidence is conclusive as in this case, the court may direct a verdict. *Skeen v. Paine*, 32 Utah, 295 (90 Pac. 440).

In my opinion the ruling of the district court was correct, and should be approved.

DEEMER, C. J., joins in the dissent.

JOHN J. WORRELL, Plaintiff and Appellee, v. THE CITY  
OF BLOOMFIELD, Defendant and Appellant.

**Municipal corporations: STREETS: NUISANCE: EVIDENCE.** The plaintiff in this action is seeking to recover damages for injury to a horse hitched in defendant's street at a hitching post, around which wood ashes had been deposited resulting in the formation of lye which caused the injury to the horse. It is defendant's contention that the hitching post was not in the street but outside of the street line, and that the nuisance complained of was beyond its limits, although there was nothing visible to indicate the line of the street. *Held,* that the evidence was sufficient to support a finding that the hitching post was upon a strip of land used as a part of the street and was appurtenant thereto, and that the question of the location of the hitching post was properly submitted to the jury.

*Appeal from Davis District Court.*—HON. C. W. VERMILLION, Judge.

MONDAY, OCTOBER 24, 1910.

ACTION for damages for alleged injury to plaintiff's horses, caused by an alleged nuisance in one of defendant's streets. The answer was a general denial. Verdict and judgment for plaintiff for \$100. Defendant appeals.—*Affirmed.*

*John F. Scarborough*, for appellant.

*Payne & Goodson*, for appellee.

EVANS, J.—The record in this case is voluminous, and the assignments of error are very many. These latter, however, all circle about one main contention, namely, that

the alleged injury to plaintiff's horses occurred, not upon the street of the defendant, but upon a strip of ground adjacent thereto. Madison Street is one of the main business streets of the defendant city. It extends north and south, and it runs along the west side of the Courthouse Square. A reference to the following photograph of said street will be an aid to an understanding of the case:

The plaintiff drove his team along this street, and turned it to one of the hitching posts which appear in the photograph on the east side. At the foot of this post some wood ashes had been deposited the night before in a depression or cavity. During the night a heavy rain had fallen, which resulted in the formation of lye, as contended by plaintiff. By the action of the horses, this lye was splashed about their legs to the alleged serious injury of the horses. Evidence was introduced, on behalf of the plaintiff, tending to show that such ashes were deposited at such place by the direction of the mayor of the city. The evidence was such as to warrant a finding that the same constituted a nuisance. On the part of the defendant, it was denied that the mayor directed the deposit of such ashes, or had any knowledge thereof. It was also contended that the line of hitching posts was outside the line of the street, and that the nuisance complained of was likewise beyond the limits of the streets. Because of this alleged fact, it is contended, also, that a verdict should have been directed for the defendant.

A few salient facts are undisputed. Madison Street, as laid out in the original plat of the town, was eighty feet wide. What now appears upon the plat as Courthouse Square formerly belonged to the town. In 1872 the town dedicated the same to Davis County for courthouse purposes. Its dimensions as they appear upon the plat were three hundred feet square. This dedication was accepted by formal resolution by the board of supervisors in 1875. In 1878 a courthouse was erected thereon, and a fence



erected about the square. The dimensions, however, of the tract which was actually inclosed by the fence, were



two hundred and seventy-five feet square, leaving a strip twenty-five feet wide adjacent to the surrounding streets. Parallel with the true east line of Madison Street, and about seven feet east thereof, a line of hitching posts has been maintained for many years. When they were first installed does not appear. For aught that appears, they had their beginning prior to the time of the dedication of the square to the county. Parallel with the hitching posts, and along the west side of the west fence of the Courthouse Square, a permanent sidewalk has been maintained for many years. There is evidence tending to show that in 1878 the county incurred some expense in paving, with stone, a strip about eight feet wide lying west of the line of hitching posts, and that in 1899 it substituted new posts for the old ones then standing. There was nothing visible indicating the true line of the street, as distinguished from the line of hitching posts and the sidewalk and the courthouse fence. There is also evidence, in behalf of the plaintiff, tending to show the exercise by the city of jurisdiction over the strip in question.

The foregoing is a very brief summary of the voluminous record. It is manifest therefrom that there was abundant warrant, under the evidence, to find that the strip in question had been used as a part of the street and as appurtenant thereto. The hitching posts themselves were appurtenant to the street, and their use as such could, without doubt, have been abated at any time by proper proceedings by the city authorities. Their use as hitching places necessarily involved the use of a part of the street proper, as distinguished from the seven-foot strip. Whether the city had exercised jurisdiction over such seven-foot strip, and whether it had thereby been used as a part of the street, was submitted by the trial court to the jury as a question of fact. This was done by instructions proper in form, of which no complaint is made. This was the proper course. The whole question is ruled by the following cases: *Kir-*

*cher v. Town of Larchwood*, 120 Iowa, 579; *Harrison v. Town of Ayrshire*, 123 Iowa, 530; *Earl v. City of Cedar Rapids*, 126 Iowa, 364; *Shannon v. Tama City*, 74 Iowa, 23.

Our conclusion at this point is decisive of a large majority of the specific errors insisted upon by the appellant, both as to the admission of testimony and instructions requested and refused. Some other minor or incidental errors are alleged that are not necessarily dependent upon our holding on this question. We have examined them all, and find no prejudicial error in any ruling complained of. We are satisfied that the defendant had a fair trial, and no proper ground for reversal is shown. The judgment below will therefore be *affirmed*.

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B. F. *MENOHER*, Appellant, v. INCORPORATED TOWN OF GRAVITY, IOWA, Appellee.

**Municipal corporations: STREETS: DEDICATION.** In this action to enjoin the defendant town from appropriating as a part of the street a strip of land claimed to belong to plaintiff, the evidence is held to show that the street as dedicated was one hundred feet wide and not eighty feet in width as extended and fronting on plaintiff's property.

*Appeal from Taylor District Court.*—HON. H. M. TOWNER,  
Judge.

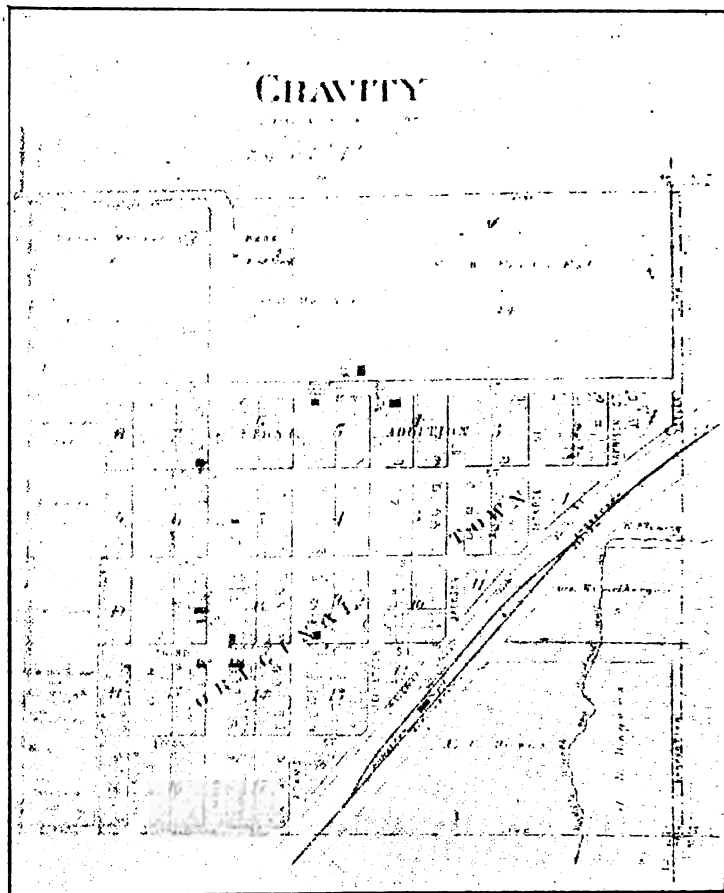
MONDAY, OCTOBER 24, 1910.

ACTION in equity to enjoin the defendant down and its officers from appropriating as a part of the street a strip of ground alleged to belong to the plaintiff. Decree for the defendant. By amendment the plaintiff added a second count, wherein he claimed title to a strip of ground four feet wide adjoining the park of the defendant town. On such count, the decree was in his favor. Both parties appeal.—*Affirmed* on both appeals.

*William M. Jackson*, for appellant.

*Frank Wisdom* and *W. C. Van Houten*, for appellee.

EVANS, J.—I. The controversy in the main case between the parties involves the question whether the street in front of plaintiff's property has a width of one hundred feet, or only eighty feet. The following diagram shows the platting of the original town of Gravity, together with the property of the plaintiff lying to the north thereof.



The street involved in the controversy is Main Street extending north and south. Sixth Street, running east and west, constituted the north boundary of the original town plat. It is conceded, that, so far as the original plat is concerned, Main Street is one hundred feet wide. It is contended by the plaintiff, however, that north of Sixth Street the extension of Main Street is only eighty feet wide. Plaintiff was the owner of land on the north, east, and south sides of the park indicated in the diagram. His grantor laid out an addition, which involved an extension of Main Street to some extent above Sixth Street. Later the plaintiff himself laid out a second addition, which involved a further extension of such street to his north boundary. The strip of land lying to the north of the park was indicated in his plat as "lot 110." There was some irregularity and some inconsistency apparent in the platting. The plat of his addition showed an extension north of the east and west lines of Main Street as they appeared on the original plat. It did not show any diminution of width. The plaintiff himself built a picket fence, and has maintained it for many years, along a line fifty feet east of the conceded center of Main Street as extended. He also built a temporary sidewalk. The discrepancy or inconsistency which appears at this point is that the number "80" was inserted on the plat as indicating the width of this Main Street extension. Much evidence was taken, and the controversy between the parties must be determined as a question of fact. The trial court found the weight of the evidence with the defendant, and we think it was clearly so. The effect of the decree of the lower court was to find Main Street to be one hundred feet wide in its extension fronting on plaintiff's property.

The principal occasion of the controversy is that large shade trees are growing on the disputed strip, which are in close proximity to plaintiff's residence. The proposed improvement of the street, by bringing it to grade and

preparing it for a permanent sidewalk, will interfere to some extent with some of these trees. It is contended by the plaintiff that the decree ought to have reserved his right to these trees, even though they were found to be in the highway. It is sufficient to say that the ordinance and resolution under which defendant town is acting expressly requires the protection of all shade and ornamental trees to the fullest extent possible, and there is nothing in the record to warrant the belief that there is any intention on the part of the town officers to ignore the spirit of such ordinance and resolution and the plain requirements of the law in such cases.

II. The second branch of the case involves a dispute over a four-foot strip of ground lying along the south side of the park, indicated on the diagram. One of the former owners of plaintiff's land dedicated the park to the town by appropriate description of metes and bounds. The town took possession of such park, and fenced and improved it, and this was done more than twenty years ago. Some mistake, however, appears to have been made as to its true location. The tract actually taken by the town was of the proper dimensions, but it lay as a whole four feet farther north than the description indicated in the deed of gift. The result was that the town included in its park a strip of ground along its north side four feet wide, which had not been conveyed to it by its grantor, and that it left to its grantor a strip four feet wide along its south line, which had been conveyed. This discrepancy was discovered many years ago, and seems to have been acquiesced in by both parties, and each has exercised undisputed dominion over the respective strips in his actual possession. The trial court adjudged each to be the owner of the strip so possessed by him, and required that each relinquish to the other by proper quitclaim deed, so as to give to each a paper title conformable to his possession. We think the evidence warranted the decree in this respect.

The decree of the trial court is therefore affirmed on both branches of the case.

*Affirmed* on both appeals.

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REEVES AND COMPANY, INCORPORATED, v. R. R. YOUNGLOVE and B. R. YOUNGLOVE, Appellants.

**Sales: WARRANTY: NOTICE OF DEFECTS: EVIDENCE.** The purpose of  
1 the provision in a contract for the sale of machinery that the purchaser shall give the seller notice of defects therein is to afford the seller an opportunity to inspect the machinery and remedy the defects; and where the seller has been given actual notice and has acted upon the same as fully as he could have done had formal written notice been given as required by the contract, he is in no position to complain of the notice. It is also the general rule that an agent having power to sell machinery under a contract which contains conditions for the benefit of the seller has authority to waive such conditions. In this action for the price of machinery sold under a contract giving the purchaser a stated time for its trial and providing for written notice of defects to the seller and local agent, it is held that the verbal notice to the agent who acted upon the same and attempted to remedy the defects, and written notice to the seller within the time allowed for a trial of the machinery, were sufficient.

**Same: BREACH OF WARRANTY: WAIVER.** It is also held that as the  
2 agent after an unsuccessful attempt to remedy the defects in the machinery informed the buyer that the same belonged to him and that he would have to pay for it, the buyer was justified in believing that the seller would not accept a return of the machinery or do anything further towards fulfilling the conditions of the warranty, and his failure to return the machinery as required by the contract does not preclude him from relying upon a breach of the warranty.

**Same: BREACH OF WARRANTY: RECOVERY OF DAMAGES.** Under a con-  
3 tract for the sale of machinery which provides that the buyer shall settle therefor by payment of freight and the giving of notes for the price, for a trial of the machinery and return thereof if it fails to comply with the warranty, the buyer may recover the freight paid where the warranty is not fulfilled.

*Appeal from Woodbury District Court.*—HON. JOHN F. OLIVER, Judge.

MONDAY, OCTOBER 24, 1910.

THE defendants appeal from a judgment against them on a directed verdict.—*Reversed.*

*W. G. Sears and B. E. Goodspeed*, for appellants.

*Shull, Farnsworth & Sammis*, for appellee.

SHERWIN, J.—The defendants gave the plaintiff their notes for a set of steam lift plows, and this suit was brought to recover thereon. The defendants pleaded a breach of warranty and a waiver of certain conditions of the contract, which will be further noticed herein. They also made a counterclaim for freight paid by them. At the close of the evidence, the plaintiff's motion for a directed verdict was sustained, and a judgment was rendered against the defendants for the full amount of the plaintiff's demand. The only parts of the contract material to the question before us for determination are as follows:

The undersigned (hereinafter called the purchaser), residing at Merville, Iowa, this day orders of Reeves & Company (Inc.), of Columbus, Indiana (hereinafter called the vendor), twelve fourteen-inch flexible frame steam lift plows, breaker bottoms.

In consideration whereof the purchaser agrees to receive the same on its arrival, subject to all considerations of the warranty, pay freight and charges thereon from Columbus, Indiana, and also agrees to pay to the vendor's order the sum of twelve hundred dollars (\$1,200.00). One note due November 1, 1907, six hundred dollars (\$600.00), and one note due November 1, 1908, six hundred dollars (\$600.00), payable at Merville, Iowa.

Machinery to be loaded on cars at Columbus, Indiana,

on or about the 20th of March, 1907, shipped to Reeves & Company, Drinkwater, Sask. . . .

Purchaser agrees to fully settle for said machinery before delivered by paying said freight and charges and by giving said notes. . . .

#### WARRANTY.

Caution: That no person, unless authorized in writing from the home office, at Columbus, Indiana, by an officer of this company, has any authority to add or abridge, or change this warranty in any manner, and to do so will render it void and of no effect.

The machinery furnished on this order is warranted to be made of good material, well constructed, and with proper use and management to do as good work as any other of the same size and rated capacity made for the same purpose.

If inside of six (6) days from the day of its first trial it shall fail in any respect to fill this warranty, written notice shall be given immediately by the purchaser to the vendor at its home office, Columbus, Ind., and written notice also to the local agent through whom the same was received, stating particularly what parts and wherein it failed to fill the warranty, and a reasonable time be allowed vendor to get to the machinery with skilled workmen and remedy defects if any there be (if it be of such a nature that a remedy can not be suggested by letter), the purchaser to render all necessary and friendly assistance and to cooperate in making the machinery a practical success. If any part of the machinery can not be made to fill the warranty, that part which fails shall be returned immediately by the purchaser to the place where it was received, with option in the vendor to either furnish another machine or part in place of the machine or part so returned or to return money and notes which shall have been given for the same, and thereby rescind the contract *pro tanto* or in whole, as the case may be, and be released from any further liability.

If vendor shall furnish another machine in place of the one returned, the terms of this warranty shall be held to be fulfilled, and the company shall be subject to no further liability under this order.



It is further mutually agreed and understood that the use of said machinery after the expiration of the time named in the above warranty shall be evidence of the fulfillment of the warranty and full satisfaction to the purchaser, who agrees thereafter to make no further claim on the vendor.

Neither shall the fact of any local or traveling agent or expert of this vendor rendering assisting of any nature after the above warranty has been concluded operate as an extension of the condition thereof.

The plows, with an engine to pull the same, were delivered to the defendants at Drinkwater, Canada, under the supervision of Mr. Lowell, a general agent for the plaintiff in charge of that territory. The first trial of the plows was made on a farm about a mile from Drinkwater. The plows did not work well, and on the third day of the trial the defendants in person notified the plaintiff's local agent at Drinkwater of such fact. Word was then received from Mr. Lowell, the general agent, that Mr. Clay, the inventor of the plows, was at Regina, and would like to see them work. The defendants immediately sent word to Mr Lowell that the plows were not doing satisfactory work, and asked that he and Mr. Clay come at once. Mr. Lowell and Mr. Clay arrived at the Farrer farm, where the plows were, that same evening, and followed the plows part way across the field. They did not then make any attempt to adjust the plows, but returned to Drinkwater for the night. They returned to the Farrer farm the next morning about five o'clock, made a slight adjustment calculated to regulate the depth of the furrow, and left again at about seven o'clock in the morning. The defendants worked with the plows that day and the next. Their work was still unsatisfactory, and one of the defendants then went to see Mr. Lowell at Regina, where he told him that the plows were not working any better. Mr. Lowell said that he did not know as he could do anything, but that he would try to

1. SALES: war-  
ranty: notice  
of defects:  
evidence.

get Mr. Clay back, and, as soon as he came back, that they would "come on and see what they could do." Within a short time thereafter, Mr. Lowell, Mr. Clay, and two other agents of the plaintiff went to the Farrer farm, and attempted to make the plows work well, but they were unable to do so, and soon abandoned the effort. One of the defendants then asked Mr. Lowell, the general agent, what he should do with the plows, and Mr. Lowell answered that he did not care what was done with them; that the defendant would have to settle for them in any event. On the third day of the trial the defendants also mailed a written notice of the defects in the plows to the plaintiff at its home office in Columbus, Ind.

The foregoing recital of facts is in itself sufficient to show that it was error to direct a verdict for the plaintiff. The contract gave the defendants six days for a trial of the machinery, and provided that, if it failed in any respect to fill the warranty, written notice thereof should be immediately given the home office of the plaintiff, and a similar notice be given the local agent through whom the plows were received. A written notice properly addressed was mailed to the plaintiff, the only way that it could be given within the six days allowed for the trial, and, while the plaintiff denied having received the same, it was for the jury to say whether under all of the circumstances it did receive it. But, whether the letter was received or not, we think the case should have gone to the jury on the question of waiver for this reason. Notice was given to the general and local agents, and a written notice mailed to the plaintiff on the third day of the trial of the plows, and, in response to these notices to the general and local agents, the general agent and an expert from the plaintiff's factory appeared and inspected the work of the plows. Still later, but within the time required by the contract, another notice was given the general agent, to which he responded by again appearing with the same

expert and two other agents of the plaintiff, at which time they attempted to make the plows comply with the warranty. The presumption is that these men were authorized by the plaintiff to do exactly what they did do, and in the absence of any evidence to the contrary, such presumption is sufficient, at least, to take the question to the jury. The manifest object of the notices was to give the plaintiff an opportunity to inspect the work of the plows and to remedy defects, if any; and when this has been done, and he has acted as fully as he could have done with a more formal notice, he can not complain. *First National Bank v. Dutcher et al.*, 128 Iowa, 413, and cases cited therein. It is also the general rule that an agent having power to sell a machine under a contract which contains conditions for the benefit of the seller has authority to waive such conditions. *Bank v. Dutcher, supra*.

The contract provides for notice after the expiration of the six-day trial provided for, and then the plaintiff was to have a reasonable time in which to make the machinery comply with the contract. It not  
2. SAME: breach  
of warranty:  
waiver. only appeared and undertook this work, but, if the defendants are to be believed, such appearance was in response to the notices given. The plows were not returned to Drinkwater as required by the contract, but the appellants contend that there was a waiver of such return. Whether there was such a waiver was a question for the jury. After the last trial, in which Mr. Lowell and the three other agents participated, the defendants stated to Mr. Lowell that they were not satisfied with the work of the plows, and asked him what they should do with them, to which he replied that he did not care what they did with the plows, that they belonged to them, and that they would have to pay for them. Although the defendants did not in the exact language offer to return the plows to Drinkwater, such was the fair import of the question, and it was evidently so understood by Mr. Lowell, as in-

licated by his answer. The defendants were, therefore, justified in believing that the plaintiff would not accept the plows or do anything more towards meeting the requirements of the warranty, if they were returned, but would enforce payment of the notes then held by them for the purchase price. *Kuhlman v. Wieben*, 129 Iowa, 188; *McDermott v. Mahoney*, 139 Iowa, 292.

The trial court would not permit the defendants to prove the amount of freight on the machinery paid by them under the terms of the contract. The ruling is wrong.

3. **SAME: breach of warranty: recovery of damages.** Under the terms of the contract the plows were to be delivered to the defendants at Drinkwater, Canada, and settled for there, the defendants to pay therefor the freight from Columbus, Ind., and twelve hundred dollars. The contract itself says that the "purchaser agrees to fully settle for said machinery before delivery by paying said freight and charges and by giving said notes." The defendants are entitled to recover the freight and charges paid, if it be found that there was a breach of warranty, and that the defendants are entitled to relief on account thereof. *Briggs et al. v. Rumely Co.*, 96 Iowa, 202. Whether or not the plows did comply with the warranty was a question for the jury; the evidence on the subject being conflicting. The case should have been submitted to the jury. The judgment is therefore *reversed*.

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J. E. ADAMS, Appellant, v. J. A. CRAIG, Appellee.

**Resulting trusts: EVIDENCE.** In this action to establish a resulting trust in land in favor of a son, the legal title to which was in his parents, on the ground that the son furnished the money for the purchase of the land with the understanding that the same was to be his property, the evidence is held insufficient to establish the trust.

VOL. 148 IA.—45.

*Appeal from Lee District Court.*—HON. W. S. WITTHROW,  
Judge.

MONDAY, OCTOBER 24, 1910.

ACTION in equity to establish a resulting trust in a certain house and lot in the city of Keokuk. There was a decree for defendant. Plaintiff appeals.—*Affirmed.*

*F. T. Hughes* and *E. L. McCoid*, for appellant.

*J. E. Craig* and *Theodore A. Craig*, for appellee.

EVANS, J.—The plaintiff is the son of James R. Adams and America Adams, who are people of little knowledge and no means. This son was a kind and industrious boy, who found employment in Seattle more than twenty years ago, and who has continued there ever since, and who has affectionately contributed to the support of his father and mother throughout those years. Out of the moneys so remitted by the son the mother frugally and persistently saved a little from time to time and hid her treasure in the ground until it amounted to \$125. She had a desire for a home of her own, and this furnished the motive of her self-denial. She found for sale a little place at a price of \$200, and she bought it, paying \$125, and executing her note and mortgage back for the balance of the purchase price. In time the \$75 balance was also paid, and the home and the sky above it were both clear. And then the defendant appeared as a dark cloud in the blue. He was a creditor who had obtained a judgment by default against the couple on an old debt antedating the acquisition of the homestead. He levied an execution upon the little home and took it. Thereupon this action was brought in behalf of the son to impress a trust on the property in his favor on the theory that it was purchased with his money. The claim

of counsel for appellant is that the son sent this money for the purpose of buying this home, and that the intention was that the title should be taken in his name, but that either for convenience or through inadvertence it was taken in the name of America Adams, his mother. Unfortunately the record is barren of evidence in support of this special claim. The plaintiff was not present in person during any of the negotiations for the purchase of the property.

Whatever understanding he had with his parents was expressed through correspondence between them. Under persistent objections of defendant's counsel, the plaintiff's counsel persisted in proving such alleged understanding by the oral testimony of the parties. Not a line of any letter was offered in evidence, nor was any pretense of foundation laid for the introduction of secondary evidence. Defendant's objections to this line of evidence as made in the court below are presented in the record before us and are urged upon our attention, and we can not ignore them. Even if such objections were not urged, we think it must be said that the evidence fails to show that there was any special understanding that the money sent by the plaintiff to his parents was to remain his money. On the contrary, it seems to have been sent generously for their general support, and it became their property as soon as received. The case has its pathetic features, and impresses us as one of great hardship. We would gladly reach a different result if the record warranted it. We dare not enter into the field of speculation as to the larger moralities involved in this kind of a transaction. For aught that appears in this record, the poverty of the creditor may have been as pressing as that of the debtor. It would seem that nothing less would induce a creditor to levy upon a \$200 home. If, however, the fact be otherwise, and if the quality of pity has been spurned, we are as helpless as the debtors themselves. The law awards the property to the creditor,

and we have no power of mercy or of retribution. Such power is vested in a higher tribunal.

The decree entered below must be affirmed here under the law. Appellant's motion to strike additional abstract and argument of appellee must be also overruled.—*Affirmed.*

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EVERETT BUNKER and VERNA BUNKER v. THE INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant.

**Mortgages: ASSIGNMENT: BONA FIDE PURCHASER.** The recording statutes have no application to the transfer of instruments which are transferable by indorsement and delivery, so far as a subsequent purchaser is concerned. Thus, where the assignee of a note and mortgage procured the assignment from the mortgagee after he had indorsed the note in blank and delivered it with the mortgage to a third person, and while the latter was to his knowledge in possession thereof, he was not an innocent purchaser although the former assignment was not recorded.

**Same.** Where the assignee of a note and mortgage acquired the same, as in this case, subsequent to an indorsement of the note in blank and a delivery of it and the mortgage to a third person, under an agreement to find a purchaser of the note and to apply the proceeds to the payment of claims against the mortgagee and to account to him for the balance, an equitable interest only was thereby acquired, which could not be asserted against the rights of the original transferee; and where the original transferee in conjunction with the mortgagee induced the mortgagor to take up the note prior to maturity and used the proceeds accordingly, the subsequent assignee had no claim against him therefor, although he obtained less than the face of the note.

*Appeal from Ringgold District Court.*—HON. H. M. TOWNER, Judge.

MONDAY, OCTOBER 24, 1910.

**ACTION** in equity to quiet title to land and to remove a cloud therefrom. Decree for the plaintiffs. Defendant appeals.—*Affirmed.*

*Paschal & Dubach*, for appellant.

*Fuller & Fuller* for appellees.

EVANS, J.—Plaintiffs are husband and wife. The husband, Everett Bunker, is the owner of certain land, and for convenience of discussion our reference to the plaintiff will be confined to him alone. On April 19, 1907, he executed a negotiable note for \$1,300 to one Blackman, payable in five years and secured by mortgage on his land. A few days later Blackman transferred this note and mortgage to one Fuller by blank indorsement of the note by delivery of the note and mortgage. Fuller was at that time agent and attorney for certain creditors of Blackman, and as such held claims against him for collection amounting to \$911. The consideration for the transfer was that Fuller was to find a purchaser for said note, if possible, and was to apply the proceeds to the payment of the claims held by him against Blackman, and to account to Blackman for the same. In June, 1907, Blackman executed a purported written assignment of such note and mortgage to the defendant; the same being then in the actual possession of Fuller under the previous transfer. Such assignment was duly acknowledged, and the assignment was placed of record by the defendant. Such assignment was made to secure indebtedness owed by Blackman to defendant. In January, 1908, no purchaser having been found for the paper, negotiations were entered into with the mortgagor, the plaintiff herein, which resulted in his taking up his paper in advance of its maturity for an agreed price of \$900. The claims of Fuller with accrued interest amounted to considerably more than this sum; but Fuller and Blackman both assented to the arrangement, and Fuller surrendered the papers and Blackman executed a formal release of the mortgage of record. The defendant, however, asserts a claim to the mortgage, under its purported assign-



ment and the plaintiff has brought this action to remove the cloud to his title caused thereby.

I. It is the first contention of the defendant that Fuller failed to put upon record any assignment of the mortgage to him, and that the defendant purchased without

1. MORTGAGES:  
assignment:  
*bona fide*  
purchaser.

notice and that its claims are therefore par-amount. This contention is wanting in merit. The paper was transferable by indorsement and delivery, and our recording statutes have no application to such a case so far as subsequent purported purchasers of the paper are concerned. If the defendant had been a subsequent purchaser or incumbrancer of the land, and as such had innocently relied upon a release by the mortgagee, a different question would be presented. In the case before us the defendant is in no sense an innocent purchaser either in fact or in law. It knew that the paper was not in the possession of Blackman when he executed the assignment, and it knew that it was in the possession of Fuller. The answer avers that the defendant was informed by Blackman that Fuller held the paper for collection, but no proof was offered of even such averment.

II. It is contended, however, that defendant acquired a lien on the mortgage by its assignment, and that its right could not be affected by any subsequent act of Blackman and Fuller and the mortgagor. In a legal

2. SAME.

sense defendant acquired nothing by its assignment. Its contract, however, was one of which equity could take cognizance, and could extend to defendant equitable relief thereunder. Neither in law nor in equity, however, could such relief be permitted to impair the rights already acquired by Fuller by the transfer to him. The most that equity could do in such a case would be to permit the defendant to take the balance of proceeds, which would otherwise have gone to Blackman, in case Fuller had realized out of the paper more than sufficient to pay the claims in his hands. No such situa-

tion has arisen, and no showing is made which entitles the defendant to equitable relief. Doubtless a court of equity would require diligence and good faith on the part of Fuller in his efforts to realize upon the paper. Such diligence or good faith is in no manner challenged in this case. The evidence is undisputed that Fuller realized the utmost possible out of the paper. The mortgage was a third mortgage and made a total incumbrance of \$4,850 on one hundred and twenty acres of land worth from \$37.50 to \$40 an acre. The mortgagor was without other means. In order to take up this mortgage at this price, he borrowed the amount upon the suretyship of a brother-in-law. The trial court found that \$900 was the full value of the mortgage, and such finding was abundantly justified by the evidence. No right of the defendant, either in law or equity, has been infringed. The utmost that a court of equity could have done for it would be to give the margin over and above the claims held by Fuller. There is no claim that there has been any bad faith. The acts of Fuller were strictly confined to the authority conferred upon him before the defendant acquired its assignment. The claim which it now presents by its cross-bill is a mere form of right without the substance. Equity will not permit him to harass the mortgagor with a shadow nor to menace his title with a cloud. *Yoder v. Bank*, 142 Iowa, 223.

III. It is urged, in argument, that Blackman, and not Fuller, made the agreement with plaintiff Bunker, and that such agreement was therefore subject to the previous assignment made by Blackman. Blackman took the initiative in the negotiations with Bunker. He made persistent effort to realize a larger sum, but without success. The utmost that Bunker would do was to pay \$900 to which Blackman on his part finally consented, and the matter was then referred to Fuller, who gave his assent thereto. It was entirely legitimate and commendable that Blackman should lend his efforts in the direction of realizing on the paper.

It was commendable that Fuller should want the assent of Blackman to whatever was done. The negotiations and assent on the part of Blackman, however, would avail nothing without the assent of Fuller. The surrender and extinguishment of the papers was the act of Fuller. It was none the less so because he availed himself of the negotiations of Blackman.

We think the decree of the district court was right in all respects, and it is accordingly *affirmed*.

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H. H. SAWYER, Appellant, v. F. B. COLLINS.

**Intoxicating liquors: RESOLUTION OF COUNCIL: SUFFICIENCY.** One of the essential requisites to the right to sell intoxicating liquor under the mulct law is that the town council shall by formal action adopt a resolution authorizing the same and that a record of such action shall be preserved. And where this has not been done a properly certified copy of the resolution can not be made and filed with the auditor as contemplated by the statute. In this action it is held that the purported resolution of the council and the record thereof were insufficient.

*Appeal from Woodbury District Court.*—HON. FRANK R. GAYNOR, Judge.

MONDAY, OCTOBER 24, 1910.

ACTION to abate a liquor nuisance. There was a decree for the defendant, and plaintiff appeals.—*Reversed*.

*John F. Joseph*, for appellant.

*Geo. G. Yeaman*, for appellee.

McCLAIN, J.—The sole question raised on the trial was as to the sufficiency of the showing that defendant, who

was conducting the business of selling intoxicating liquors in the town of Danbury in Woodbury County, had received the consent of the town council to conduct such business. The statute provides as one of the conditions which must be complied with by one seeking to engage in the business of selling intoxicating liquors, where such sales are otherwise authorized by law, that, when appearing to pay the mullet tax, he "shall file with the county auditor a certified copy of a resolution regularly adopted by the city council consenting to such sales by him." Code, section 2448, par. 2.

By stipulation in this case it appears that the following is a true and correct copy of the action or resolution of the town council of Danbury with respect to defendant, and that the original was filed by him with the county auditor and has since remained on file:

Danbury, Iowa, June 24, 1909.

To the Honorable Mayor and Town Council of the Incorporated Town of Danbury, Iowa.

Gentlemen: I hereby petition your honorable body to grant me the privilege of conducting a saloon on lot 10, block 7, of Danbury, Iowa.

F. B. Collins.

Sixth month 25th day, 1909.

Called vote of council.

Trustee Boyer voted yea.

Trustee Braig voted yea.

Trustee Collins voted yea.

Trustee Jacobson voted yea.

Trustee Drea voted yea.

Carried.

P. C. Keitges, Mayor.

Attested: P. N. M'Laughlin, Town Clerk.

It seems to us that the filing of this paper with the county auditor did not constitute a compliance with the statutory condition. Waiving the question whether the filing of the original paper constituting the only record, if there was any record of the action of the town council, was a compliance with the requirement that a certified

copy of the resolution of the council be filed, we fail to find in the paper filed, conceding it to be genuine, any evidence that a resolution ever was passed by the town council of Danbury. A resolution is "a formal expression of the opinion or will of an official body or a public assembly adopted by a vote." See Webster's International Dictionary. It is "the determination or decision with regard to its opinion or intention of a deliberative or legislative body; . . . also a motion or formal proposition offered for adoption by such a body." See Black's Law Dictionary; *El Paso Gas, etc., Co. v. El Paso*, 22 Tex. Civ. App. 309 (54 S. W. 798); *State v. Delesdenier*, 7 Tex. 76. It seems to us, to constitute such a resolution as is contemplated by the statute, there must have been formal action of the town council and a record of such action preserved, for the statute requires a certificate of a record. From the record before us it does not appear that there was any formal action. Accepting the recital of the mayor as to what was done by the council, it appears that he called a vote on some question relating to defendant's application for the privilege of conducting a saloon, but what the question was or what he called a vote for is not made to appear. Such a matter should not be left to mere inference, for it is of great importance to the public that those who assume to sell intoxicating liquors shall not be allowed to do so unless the requirements of the statutes have been affirmatively complied with.

The requirement of a formal record which could be certified is equally unsatisfied. The town clerk attests the signature of the mayor to the paper which was offered in evidence, but he does not in any way or form attest or certify that any action of the town council was ever made a matter of record. By statute the town clerk is required to "make an accurate record of all proceedings and rules and ordinances adopted by the council and the same shall at all times be open to the public" Code, section 659.

Whatever may be the validity for other purposes of resolutions actually adopted by a town council but not properly made of record by the clerk, it is evident that for the purpose of the statute which we are construing a record is essential, for without a record there can be no certified record. We think the paper above set out does not constitute either a record or a certified copy of a record of any resolution of the town council.

As it appears from the record that defendant had not in the respects pointed out shown a compliance with the requirements of the statutes, he should have been enjoined from carrying on the business of selling intoxicating liquors.

The decree of the trial court is therefore *reversed*.

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LEWIS BAILEY, Appellant, v. JELENA KENNEDY,  
Administratrix.

**Husband and wife: ALIENATION OF AFFECTION: BURDEN OF PROOF: EVIDENCE.** Where the petition in an action for the alienation of affection alleges that defendant by protestations of love and affection did alienate the wife's affection and induce her to leave the plaintiff, and the allegations were denied by defendant, the plaintiff had the burden of showing that defendant's conduct resulted in the alienation of his wife's affection, and that it was in itself wrongful or was done with intent to alienate her affection. In this action the evidence is reviewed and held insufficient to warrant a verdict for plaintiff.

*Appeal from Cedar District Court.*—HON. W. N. TREICHLER, Judge.

WEDNESDAY, MAY 11, 1910.

THIS is an action for damages for alleged alienation of affections of the plaintiff's wife. There was a directed

verdict for the defendant, and the plaintiff appeals.—*Affirmed.*

*Geo. C. Hoover, Ranck & Bradley, and Tillman Todd,*  
for appellant.

*Baker, Ball & Ball, J. H. Preston, J. T. Moffit, and*  
*Carl H. Mather,* for appellee.

EVANS, J.—George C. Sanger was the original defendant. Shortly after the commencement of the suit, he died, and his administratrix was duly substituted. In the discussion of the case it will be more convenient for us to refer to Sanger, whose acts are called in question, as the "defendant," rather than his administratrix. The plaintiff alleged in his petition that about nine years previous the defendant "did by protestations of love and affection, undue influence, and other means, alienate the affection of the wife of the plaintiff." He also alleged that the defendant induced the wife to refuse to return to plaintiff or to live with him, and that the defendant lived and cohabited with her as his wife, and so continued down to the time of the filing of the petition. These allegations were all denied in the answer. The petition was filed in April, 1907. The defendant died in June, 1907, and before the cause was reached for trial.

Under the issues as made, the burden was upon the plaintiff to show: (1) That the conduct of the defendant did result in alienating from plaintiff the affections of his wife; and (2) that such conduct of the defendant was in itself wrongful, or, if not wrongful in itself, that it was done with intent to alienate the affections of plaintiff's wife.

In advance of trial some depositions were taken on behalf of the defendant. These were all introduced in evidence by plaintiff in his main case. The motion to

direct the verdict was made at the close of the plaintiff's evidence. The story as disclosed by the evidence is a brief one. The plaintiff was a stepson of the defendant; his mother having married the defendant during the plaintiff's childhood. Out of this marriage a son and a daughter were born. The substituted defendant's administratrix is such daughter. Shortly prior to 1900, the defendant's wife, plaintiff's mother died. The defendant and his wife were at that time living in South Dakota, whither the defendant had moved from Cedar County sometime prior. After the death of his wife, the defendant moved back to Cedar County where he owned a farm. On one corner of this farm was a small dwelling occupied by the plaintiff and his wife. The defendant boarded with them for a short period. In the fall of 1900, the defendant moved into the main dwelling house upon the farm and employed the plaintiff and his wife to work for him there. The plaintiff's work lasted through corn husking. Thereafter the plaintiff went away. He testified that he left because the defendant would not employ him any longer, and that his wife would not leave because she had promised to work for the defendant until the 1st of March. In 1901 the plaintiff returned to the employment of the defendant and worked for him for some months and until February or March, 1902, at which time the defendant held a public sale upon his farm disposing of his personal property, as we understand the record. The plaintiff testified that during this period his wife refused to occupy the same room with him. After the public sale, the defendant left the farm, and the plaintiff and his wife went their way. The defendant went to the home of his married daughter at West Branch. The plaintiff's wife went to the home of her mother and did not live with the plaintiff after they left the defendant's farm. The evidence discloses no further association between the defendant and plaintiff's wife until 1903. In 1903 the defendant purchased a dwell-



ing in the town of West Branch and occupied the same as his home. For a time a niece of his married daughter lived with him. Later he employed his daughter-in-law, plaintiff's wife, and she continued as his housekeeper down to the time of his death, a period of about four years. During this period the defendant visited his son in South Dakota, where he had formerly lived. Later the son removed to Idaho, and the defendant visited him there. The daughter-in-law accompanied him on each of these visits; the West Branch home being locked up in the meantime. The son so visited is a half-brother of the plaintiff. The plaintiff introduced in evidence depositions of such son and his wife and others who had opportunity to observe the demeanor of the defendant and his daughter-in-law, and all this testimony was distinctly adverse to the plaintiff's contentions. The defendant was an old man, partly paralyzed as to one hand, and seventy-four years of age at the time of his death. The testimony introduced by the plaintiff wholly fails to show any criminality in the relations between the defendant and plaintiff's wife, or any circumstances from which an inference of criminality could fairly be drawn by the jury. On the contrary, such testimony makes a strong affirmative showing adverse to the claims of the plaintiff in this respect.

The question for our consideration is reduced therefore, to the inquiry whether there was sufficient evidence from which a jury could properly find that the conduct of the defendant was wrongful in the sense that it did result in separating the plaintiff from his wife, and that such was the object maliciously intended by the defendant. The following excerpt from the testimony of the plaintiff as a witness discloses the previous relations of plaintiff and his wife:

After we were married we first lived in the house that belonged to Tom Tucker; lived there about six months; then went to Fred Lehrman's house, about a mile and

three-quarters from the other house; lived there three months probably; then went to the house at the southeast corner of George Sanger's place; lived there about six months; and then moved over to what was called the Tom James place; lived there probably six months. When my wife and I separated the first time, we were living in the little house on the southeast corner of George Sanger's place. We next went to the Hartupee place, down by West Liberty; lived there from fall until spring, three months; then went to my uncle Philip's. I think when my wife left the second time we was in the Gruwell house. From Uncle Phil's we went up on the Gruwell place; lived there three, four, or five months. I think we next moved up to the little house on the corner of the Sanger place. I expect we lived there three, four, or five months. We went back to my uncle's place and lived there probably a year, or a year and a half. We moved from there up onto T. W. Maxon's place, I think. Mr. Maxon at that time owned the place called the Gruwell place. I moved on it a good many times, a half dozen times; stayed there from three to five months each time, I guess, I don't know. I moved from the Gruwell place down on the Krab place, lived there three months. Then I went back on the old ground again. I lived up there on the Maxon place on the road until I went to Mr. Sanger's place, probably three months; went to the little tenant house on the corner of the Sanger place; that was at the time I went to Sanger's to husk corn.

Philip Bailey, an uncle of plaintiff, was a witness in his behalf, and testified as follows:

I do not remember visiting them except when they lived in my own house, and that was frequent; that was quite a while before they went to Sanger's. Before they went to the Gruwell house I was there almost every day. I took meals with them. He had no place rented; did not pay any rent for the house. He had no property there—no household goods. He owned a cow before he came to my place, only had one cow. I paid him for every day he worked on the farm. He worked for me that year probably from fifty to seventy-five days; worked in the neighborhood for others when he could get it. I saw Ann with a black eye when he lived on my place. He said that she bumped

her eye on the bedstead. She complained that he struck her in the eye, and he said that she struck it on the bedstead, and I tried to strike an average in the matter, and told him if he struck her he must not do it any more, and I said I could not have him living on my place if he abused his wife, and he claimed he did not abuse her. He used profane and obscene language frequently. I think it was in 1901 that they went to live on the Sanger farm. Mr. Sanger hired her to work in the house and him to work on the farm.

This testimony offered by the plaintiff in his own behalf shows quite conclusively that he was holding his wife's affections by a very slender thread, and, if it broke at last, this fact was not so remarkable in the light of the circumstances as to require us to look in other directions for the cause of it. It is urged in argument by appellant that his previous unhappy relations with his wife constitute no bar to the present action, and this may be conceded as a legal proposition. But these unhappy relations are a very important consideration when the mere loss of his wife's affection is put forward by the plaintiff as a circumstance sufficient to warrant the inference that such loss was caused by the conduct of the defendant, even though such conduct was not criminal nor in itself wrongful.

It is argued that a stranger may not harbor the wife of another, even though she live apart from her husband, without assuming the burden of showing good cause and good faith. This proposition involves a definition of the term "harboring," and we need not enter into a discussion of it. Taking the situation of these parties as it was in 1903, the plaintiff's wife was living apart from him and was in poverty and dependent upon her own efforts to make a living. If, under such circumstance, her father-in-law could not employ her, or even furnish her a home without being guilty of harboring her in an evil sense, then her situation was very helpless indeed.

We have gone through this record with much care, and we are satisfied that the evidence would not warrant

a verdict for the plaintiff. ' The circumstances shown are all consistent with upright conduct and proper motives. It is argued that the circumstances are sufficient to cast upon the defendant the burden of explanation. We think the most that can be said is that the circumstances constitute a scintilla of evidence, and that they might be sufficient to carry a suspicion of the possibility of criminal relations between the parties. If the defendant had lived until the trial, he might well have assumed the burden of explanation, and a failure to do so might readily intensify the suspicion. But no explanation from him was possible because of his death.

Certain alleged errors are argued by appellant based upon the rulings of the trial court in the admission of testimony. It is sufficient to say that, if all the rulings adverse to plaintiff were changed so as to be in his favor, it would not save his case.

We think the trial court properly directed the verdict, and its order is *affirmed*.

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G. W. KRAMER v. VAUGHAN LAND COMPANY, ET AL.,  
Appellants.

**Brokers: RECOVERY OF COMMISSION: EVIDENCE.** In this action to recover commission for the sale of land the evidence is held insufficient to show that plaintiff made the sale or produced a purchaser, and he is not entitled to recover.

*Appeal from Story District Court.*—HON. C. G. LEE,  
Judge.

THURSDAY, JUNE 16, 1910.

SUIT to recover a commission for the sale of land.  
VOL. 148 1A.—46.

Trial to the court, and judgment for the plaintiff. The defendants appeal.—*Reversed.*

*Mears & Lovejoy*, for appellants.

*Roy F. Hall and Bert B. Welty*, for appellee.

SHERWIN, J.—A written contract between the plaintiff and the Vaughan Land Company made the plaintiff the agent of said company in Story County for the sale of lands in Texas. The contract provided that the lands were to be sold upon the terms and conditions fixed by the land company, and that he should have commissions on all sales made by him to parties residing in Story County which were ultimately accepted by the company. The contract was not an exclusive one for Story County, but it gave the plaintiff power to appoint subagents in several towns in the county, among which was Colo. The contract required the plaintiff to report promptly all prospects. The land company also undertook to furnish help, if desired.

Soon after the contract was made, the plaintiff secured as an assistant one Atkinson, who introduced him to James Byers, of Colo, as a prospective purchaser of some of the Texas lands. Shortly thereafter the plaintiff and W. S. Kimble, another agent of the defendant, visited Mr. Byers at his home in Colo. The plaintiff and Kimble talked Texas land to Byers, and tried to induce him to go there on the next regular trip for the purpose of purchasing some of the land. A few days after this meeting of the plaintiff, Kimble, and Byers, at Colo, Byers became the agent of another land company that was also handling Texas land. On the 11th of September, a few days still later, Kimble and Gray, still another of the defendant's agents, went to see Byers about his going to Texas, and found that he had become interested with the other land company, and had promised to see his cousin, Sam Miller,

about becoming one of its prospective purchasers. At this time Byers refused to go to Miller's with Kimble and Gray, because of his promise to the other land company. On the 14th day of September Kimble and Gray again called on Byers at his home in Colo, and induced him to go with them to Miller's home at Maxwell. When they got there, Byers introduced them to Miller. Kimble and Gray presented their land proposition to Miller without any aid whatever from Byers, and Miller at once stated that he would go to look at the land only on the condition that, if he selected any, the land company would have to take a building owned by him in exchange therefor. This was agreed to by the company, and on the next day Kimble, Gray, Byers, and Miller started for Texas. While there, Byers selected a tract of land for himself, and Miller selected one. Later Byers concluded not to buy, and Miller took the tract that Byers had selected, paying therefor with the building above referred to. The plaintiff never saw Miller, but claims that he had appointed Byers his sub-agent, and that Byers produced Miller as a purchaser.

There is but little evidence supporting the claim that Byers was ever appointed a subagent of the plaintiff; but, if it be conceded that he was, there is no evidence that Byers ever produced Miller as a prospective purchaser even. He never said a word to Miller about buying land of the defendant. He never disclosed his alleged agency to anyone, and refused to visit Miller with Gray and Kimble on the 11th of September, because he was the agent of the other company. He did not initiate the visit to Miller on the 14th day of September. He went there with Kimble and Gray on their solicitation, and while there he simply introduced them to Miller. Miller was induced to make the trip to Texas by Kimble and Gray, notwithstanding the fact that Byers cautioned him against being too easily influenced by them. Furthermore, during the entire trip, Byers never said a word to Miller in favor of buying land of the

defendant. His attitude during the entire time was that of an investigator for himself, without any purpose of inducing Miller to become a purchaser.

This action is based upon a specific written contract that provides for commissions in case of sales only, and from a legal standpoint the plaintiff would be entitled to nothing, even if he had produced Miller. *Hurd v. Neilson*, 100 Iowa, 555; *Jones v. Buck*, 147 Iowa, 494. But no legal distinction is involved in this case, because Byers never did anything that can be distorted into a production of Miller as a customer of the defendant.

The plaintiff's contract did not give him the exclusive right in Story County; hence he can claim nothing because the land was sold to Miller by another.

The defendant was entitled to a judgment at the close of the evidence. The judgment must therefore be *reversed*.

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STATE OF IOWA V. HOLTON, GRAY & Co., Appellants.

**Constitutional law: PROPERTY RIGHTS: DUE PROCESS: POLICE POWER.**

1 The statutes prohibiting the manufacture and sale of flaxseed or linseed oil unless it answers the purity test recognized by the government, and that such oil shall be sold only under its true name, are not in violation of the federal constitution guaranteeing property rights to citizens in every state, or of the state constitution providing that no person shall be deprived of his property without due process of law; but the same are within a proper exercise of the police power of the state.

**Same: EXERCISE OF POLICE POWER.** The state may exercise its police

2 powers to protect its citizens against fraud when its frequency or the difficulty in detecting or preventing the same is so great that no other means will prove effective.

*Appeal from Page District Court.*—HON. O. D. WHEELER,  
Judge.

FRIDAY, JULY 8, 1910.

DEFENDANTS were convicted of selling misbranded and adulterated linseed oil and appeal.—*Affirmed.*

*Hugh A. Myers and Parslow & Peters*, for appellants.

*H. W. Byers*, Attorney General, and *Charles W. Lyon*, Assistant Attorney General, for the State.

SHERWIN, J.—The defendants were convicted under sections 2510e and 2510f of the Code Supplement 1907, which sections provide as follows:

No person, firm or corporation shall manufacture for sale or expose for sale or sell within this state any flaxseed or linseed oil, unless the same answers a chemical test for purity recognized in the United States Pharmacopœia or any flaxseed or linseed oil as 'boiled linseed oil' unless the same shall have been put in its manufacture to a temperature of 225 degrees Fahrenheit.

No person, firm or corporation shall expose for sale or sell any flaxseed or linseed oil, unless it is exposed for sale or sold under its true name, and each tank car, tank, barrel, keg or vessel containing such oil has distinctly and durably marked thereon the true name of such oil in ordinary bold faced capital letters not less than five lines pica in size, the words pure linseed oil—raw, pure linseed oil—boiled, as the case may be, and the name and address of the manufacturer thereof.

The appellants contend that the enactment is prohibitive and not a regulation, and that it is in conflict with the fourteenth amendment of the Constitution of the

United States and with section 9 of the Constitution of Iowa. The fourteenth amendment guarantees to every citizen property rights in every state; and section 9 of the Constitution of the state provides that no person shall be

1. CONSTITUTIONAL LAW: property rights: due process: police power.



deprived of life, liberty, or property without due process of law.

The question is whether the enactment in question is within the proper police power of the state. If it is, the law is constitutional. If it is not within proper police power, it can not be sustained.

The evident purpose of the statute is to prevent fraud and deception, and it does not in our judgment prohibit the sale of linseed oil that is adulterated, or any compound that contains such oil, where the product is not sold as pure linseed oil.

That the police power of the state may properly be used for the purpose of protecting its citizens against frauds, when the frequency of fraud or the difficulty in detecting it or in preventing it is so great that no other means will prove effective, is well settled.

Laws providing for the prevention and detection of frauds are generally held to be free from constitutional objection. *State v. Packing Co.*, 124 Iowa, 323; *People*

*v. Wagner*, 86 Mich. 594 (49 N. W. 609,  
 2. SAME: exercise of police power. 13 L. R. A. 286, 24 Am. St. Rep. 141);  
 Tiedemans Limitations of Police Power, 207;

*American Linseed Oil Co. v. Wheaton* (S. D.) 125 N. W. 127; *State v. Williams*, 93 Minn. 155 (100 N. W. 641); *Steiner v. Ray*, 84 Ala. 93 (4 South. 172, 5 Am. St. Rep. 332); *Powell v. Penn*, 127 U. S. 678 (8 Sup. Ct. 992, 32 L. Ed. 253). Many other cases sustaining the rule might be cited, but we are of the opinion that a proper construction of the statute in question brings the case within the rule announced in *State v. Packing Co.*, *supra*.

The judgment of the district court is therefore affirmed.

EMMA GRIFFITH, Appellant, v. MERCHANT'S LIFE  
ASSOCIATION.

**Judgments:** VACATION OF SAME FOR FRAUD. A judgment procured by  
1 fraud preventing the defeated party from pleading and proving  
the facts, thereby resulting in injustice, may be set aside on a  
timely application.

**Same.** Where a party by statements concerning a transaction with a  
2 deceased person, shown by the books of such party to be false,  
has misled another in a reliance upon such statements in prosecuting an action, and thereby procured a judgment releasing himself from an obligation which otherwise might have been enforced, the party is guilty of fraud and the judgment may be set aside on that ground.

*Appeal from Taylor District Court.*—HON. H. K. EVANS,  
Judge.

TUESDAY, OCTOBER 25, 1910.

A DEMURRER to a petition for new trial was sustained, and, the petitioner having elected to stand on the ruling, the petition was dismissed. The plaintiff appeals.—*Reversed.*

*William H. Jackson*, for appellant.

*Haddock & Son* and *Seerley & Clark*, for appellee.

LADD, J.—This is an appeal from the ruling of the district court in sustaining a demurrer to a petition for new trial.

It appears that defendant issued a policy of insurance on the life of Sheridan D. Griffith. The beneficiary was

entitled to recover on a policy of insurance if the assessment dues, amounting to \$5.60, payable on or before April 30, 1907, was valid and had been paid. The validity of the assessment was not in issue at the trial, for both the petition and answer alleged that it had become due and should have been paid as above stated. The only issue determined was whether a certain understanding with a local bank which the association had constituted a depository was equivalent to a payment. The present contention that no assessment might properly have been made for that the insured already had a credit with the association, was not in issue, and therefore the alleged fraud by which plaintiff is said to have been induced not to raise such issue can not be regarded as intrinsic. It did not relate to issues actually presented, but consisted of preventing, by resort to deception, the plaintiff from pleading and proving other facts now alleged to have existed, and thereby to have resulted in the miscarriage of justice. Such fraud is extrinsic, and a judgment procured thereby may upon timely application be set aside. See section 4091, Code; *Tucker v. Stewart*, 121 Iowa, 715; *Freeman on Judgments*, section 489. See *Graves v. Graves*, 132 Iowa, 199.

1. JUDGMENTS:  
vacation of  
same for  
fraud.

Nor do we think the pleadings affirmatively show knowledge of the fraud alleged prior to the entry of judgment. True, plaintiff filed an amendment to her petition, alleging that defendant claimed to have made the assessment and that the policy had lapsed by reason of the assured's omission to pay the policy, but that assured had a credit with defendant, and it had no right to make the assessment or declare a forfeiture. As the purpose in filing this was to conform the pleadings with the proof, the pleader must have had in mind the transaction with the bank designated as defendant's depository. The petition for new trial contains the above allega-

2. SAME.

tion, and in addition thereto others to the effect that to an inquiry of plaintiff's representative, who went from Bedford to Burlington for that purpose, the officers of defendant declared that the assessment was legal and the policy was canceled; that an examination of defendant's books will disclose that assured was not delinquent, and the forfeiture of the policy declared was void; that at the time of the trial plaintiff had no opportunity to inspect the books and records of defendant, although she sought diligently so to do; and that the true state of facts was concealed from her by the fraud and misrepresentations of the defendant.

Conceding these allegations to be true, as we must, in ruling on the demurrer, we have a case where a party, by statement concerning a transaction with a person since deceased, shown by its books to be false, has misled another into reliance thereon in prosecuting an action, and thereby procured a judgment releasing such party from an obligation which otherwise must have been enforced. Surely this amounted to a fraud such as contemplated by statute, and, being extrinsic, if proven, would justify the granting of a new trial.—*Reversed.*

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WALTER W. ROSS, Appellant, v. JAMES ROSS, ELLEN ROSS, MARGARET MASSEY, and W. H. MASSEY, SUSAN HARDY and CHARLES HARDY, JOHN M. ROSS, THOMAS ROSS, GEORGE ROSS, AMOS ROSS, FRED ROSS, ROY ROSS, MINERVA HUMMEL, CHARLES HUMMEL, FLORENCE BANKS, J. F. BANKS, DAN SMITH, H. B. SMITH, U. D. SMITH, J. L. SMITH, AMY AGNES, JAMES AGNES, MYRTLE SMITH, ROSA BODEN, WM. BODEN, DAISY SMITH, FRED SMITH, BOYSON ROSS, DOBA ROSS, ROBERT ROSS, and MARY ROSS, Appellees.

**Real property:** SPECIFIC PERFORMANCE: EVIDENCE. Specific performance of a contract for the sale of land, where the vendor is dead,

will only be declared upon clear, satisfactory and convincing evidence; and although established it will not be enforced unless equitable.

**Same.** The oral admissions of a decedent are not as a rule satisfactory evidence in support of an action to specifically enforce his contract to convey land.

**Same.** To enforce specific performance of a contract it must be established substantially as claimed; and the contract must be mutual so that it could have been enforced by the vendor. It may be established by circumstantial evidence, but the circumstances must be clear and satisfactory and not explainable on any other theory equally as consistent.

**Same.** The relationship of the parties is a cogent circumstance, and the interests of the several witnesses should be carefully considered in an action to enforce specific performance.

**Same.** In an action by a son to enforce performance of an alleged oral contract of his deceased father to convey land to him, the burden of establishing the contract is on him; and in this action the evidence is reviewed and held insufficient to warrant a decree of specific performance.

*Appeal from Plymouth District Court.*—HON. F. R. GAYNOR, Judge.

TUESDAY, OCTOBER 25, 1910.

ACTION for the specific performance of an alleged oral contract for the conveyance of real estate by one Duncan Ross, now deceased, the father of the plaintiff and an ancestor of the defendants. The trial court denied the relief asked, and plaintiff appeals.—*Affirmed.*

*Wright, Call & Sargent* and *Struble & Struble*, for appellant.

*Shull, Farnsworth & Sammis*, for appellees.

DEEMER, C. J.—A branch of this litigation has al-

ready been before us in the form of a will contest, and the opinion will be found reported in 140 Iowa, 51. In the latter part of that opinion is a suggestion of the claim made in this action. After that suit was brought and while it was pending in this court upon appeal, plaintiff commenced this action and his claim as disclosed by the petition is:

Par. 5. That on or about the month of January, 1893, the plaintiff and the said Duncan Ross, Sr., made and entered into a certain oral contract wherein the plaintiff agreed to move onto and work and farm the property hereinabove described, and take charge of the same, break up the grass land, and get the farm in shape to farm, to do such hauling as the said Duncan Ross, Sr., might desire done, look after the rent of the other farms belonging to the said Duncan Ross, Sr., keep a horse or two for the said Duncan Ross, Sr., and pay the said Duncan Ross, Sr., the sum of \$2 an acre per year during the life of said Duncan Ross, Sr., for the use of said premises, and wherein the said Duncan Ross, Sr., agreed upon his part that upon his death the real estate hereinabove described should be and become the property of the plaintiff herein.

Par. 6. That at said time the plaintiff herein was residing upon a farm of his own in the vicinity of the real estate hereinabove described.

Par. 7. That, after the making of said contract set out in paragraph 5 and in pursuance thereof, the plaintiff moved from his own farm to the real estate hereinabove described, and has ever since resided thereon, and has worked and farmed the same ever since. That he took charge of the same, broke up the grass land, and got said place in shape to farm. That he did such hauling for said Duncan Ross, Sr., as said Duncan Ross, Sr., desired done, looked after the rent of the other farms owned by said Duncan Ross, Sr., as said Duncan Ross, Sr., desired him to do, kept and cared for such horse or horses as the said Duncan Ross, Sr., desired him to, and paid the said Duncan Ross, Sr., the sum of \$2 per acre for said premises per year during his life, and did and performed

each and every thing required of him to be done under his said contract with said Duncan Ross, Sr.

Par. 8. That at the time of the making of said contract aforesaid, and at the time the plaintiff herein moved onto said premises, the same were in need of a large amount of work to put the same in good farming condition, all of which labor and work the plaintiff did. That, in addition to the matters and things required of him to be done under his said contract, he made numerous and expensive improvements on said premises in reliance upon the contract made with said Duncan Ross, Sr., that said premises were to become his property upon the death of the said Duncan Ross, Sr., all of which was done by the plaintiff with the knowledge of the said Duncan Ross, Sr.

Par. 9. That said Duncan Ross, Sr., died on the 21st day of April, 1906.

Par. 10. That said Duncan Ross, Sr., failed to make any conveyance of said premises hereinabove described to the plaintiff before his death, and failed to make any provision whereby said premises should pass to the plaintiff upon his death.

On the 5th day of October, 1908, John M. Ross, Daisy H. Peterson, Susan Hardy, Fred Smith, James Ross, Amy Agnes, John L. Smith, U. D. Smith, H. B. Smith, Daniel Smith, and Margaret Massey filed their answer to the petition of plaintiff, as follows: 'They have reason to believe that all of the allegations contained in plaintiff's petition are true, and that the plaintiff is entitled to and is the owner of the land described in his petition; that the deceased, Duncan Ross, contracted with the plaintiff to deed said land to the plaintiff; and that the plaintiff has fully complied with all of the conditions of his contract for said land as set forth in his petition. For these reasons, these defendants make no claim to said land, but admit that the plaintiff is the true owner of the same as alleged in his petition, and therefore these defendants pray the court that they may go hence with costs.'

Boyson Ross and David Ross, Robert Ross and Mary Ross joined issue with plaintiff, and, in addition to a general denial of the allegations of the petition, pleaded other defenses, some of which will be referred to as we

proceed. The case was tried to the court and held for several months before a decision was rendered. The decree was ultimately for the answering defendants, and plaintiff appeals.

The questions involved are almost wholly, if not entirely, questions of fact. The applicable rules of law are practically agreed to by counsel for the respective parties.

As the alleged vendor is dead and can not give his version of the matter, it is a whole-some rule of law that the testimony to sustain such a contract as is relied upon here must be clear, satisfactory, and convincing. *Holmes v. Connable*, 111 Iowa, 298; *Watson v. Richardson*, 110 Iowa, 673; *Allbright v. Hannah*, 103 Iowa, 98; *Bevington v. Bevington*, 133 Iowa, 351; *Truman v. Truman*, 79 Iowa, 506. Again, such contracts, even if established, must be equitable, or they will not be enforced. *Hamlin v. Stevens*, 177 N. Y. 39 (69 N. E. 118). Much has been written upon the law relating to this subject, and we can not do better than quote the following from one of our recent cases:

Before going into details, we wish, as already suggested, to say something as to the rules that should govern courts in passing upon cases of this kind. It will not do, as plaintiff's counsel seems to think proper, to hold that because a certain number of witnesses have testified to the making of the contract, and none have been called to deny it, plaintiff's case is established. The lips of the only two witnesses who could deny it are forever closed. The only person who could controvert the admissions alleged to have been made is the dead man against whose estate this claim is produced. There is no defense that can be made, save as it may be found in the improbability of the stories of the plaintiff's witnesses, when tested by comparison with other evidence in the case, or the ordinary rules of human conduct under similar circumstances. *Watson v. Richardson*, 110 Iowa, 673; *Laurence v. Laurence*, 164 Ill. 367 (45 N. E. 1073); *Wallace v. Rappleye*, 103 Ill. 229, 665. In this last case, which bears some similarity

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performance:  
evidence.



to the one at bar in its facts, the court said in relation to the oral evidence offered: 'It is incumbent on the court to look upon such evidence with great jealousy, and to weigh it in the most scrupulous manner, to see what is the character and position of the witnesses generally, and whether they are corroborated to such an extent as to secure confidence that they are telling the truth.' So on the same subject the Supreme Court of Pennsylvania said: 'The temptation to set up claims against the estates of decedents, particularly such decedents as have left no lineal heirs, is very great. It can not be doubted that many such claims have been asserted which would never have been known had it been possible for the decedent to meet his alleged creditor in a court of justice. . . . Such claims are always dangerous, and, when they rest upon parol, they should be strictly scanned. Especially when an attempt is made, under cover of a parol contract, to effect a distribution different from that which the law makes, or that which the decedent had directed by his will, it should meet with no favor in a court of law. Even if such contract may be enforced, it can only be when it is clearly proved by direct and positive testimony, and when its terms are definite and certain. The danger attendant upon the assertion of such claims requires, as we said by Chief Justice Gibson in reference to a somewhat similar contract, that a tight rein should be held over them by making the quality, if not the sum, of the proof a subject of inspection and governance by the court, and by holding juries strictly to the rule described.' *Holmes v. Connable*, *supra*.

Much of the testimony relied upon by plaintiff consists of admissions or declarations said to have been made by Duncan Ross, deceased, during his lifetime, and it is well to have in mind the universal rule that

2. SAME. such testimony is subject to many imperfections, and is not as a rule satisfactory. As said by the Supreme Court of Missouri in *Kinney v. Murray et al.*, 170 Mo. 674 (71 S. W. 197):

The evidence consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection

and mistake; the party himself either being misinformed, or not having clearly expressed himself, or the witness having misunderstood him. It frequently happens also that the witness by unintentionally altering a few of the expressions really used gives an effect to the statement completely at variance with what the party actually did say. . . . When we reflect upon the inaccuracy of many witnesses in their original comprehension of a conversation, their extreme liability to mingle subsequent facts and occurrences with the original transaction, and the impossibility of recollecting the exact equivalents, we must conclude there is no substantial reliance upon this class of testimony. The intrinsic weakness of this class of evidence is further enhanced in any given case by the length of time that has intervened since the declarations were made and the ease with which it can be manufactured and the temptation to do so, when all those by whom it could be contradicted are in their graves. Such evidence can and ought to have very little weight when it is sought by it to asperse the memory or set aside the last wills and testaments of worthy and just persons, executed in contemplation of death, and in the manner required by law disposing of their own property according to the dictates of their own consciences.

So much for the law of the case which is a necessary premise to the final conclusion. We shall not set out the testimony at length bearing upon the fact questions in dispute.

Plaintiff claims that he has established the contract pleaded by him in his petition and the full and faithful performance of all his part thereof, while defendants contend that no such contract has been established.

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lished; that the testimony does no more than indicate an intent on the part of the testator to reward his son (the plaintiff) for work done or labor performed, which intent never took the form of a contract, and never became effective because for some reason testator changed his mind and devised the real estate in controversy by specific devise to others of his heirs. It is essential, of

course, that a contract be established substantially as claimed by plaintiff, and this contract must be mutual; that is to say, it must have been such an one as could have been enforced by the father during his lifetime had the plaintiff seen fit to violate it. Such a contract may, of course, be established by circumstances; but these must be strong, satisfactory, and not explainable upon any other theory equally as convincing.

The relationship of the parties is a cogent circumstance; for it may explain many matters which had they happened between strangers would have worn a very different aspect. Again, the interest of the several

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witnesses in the result of the suit must be carefully considered; and again, although this is an equity case, some effect must be given to the findings of the trial judge, who had practically all the witnesses before him, and who had the great advantage of observing their conduct upon the witness stand.

We start with the proposition that deceased did not think he had a binding contract with plaintiff, for he willed the very property to which plaintiff makes claim

to another, and it is not reasonable to suppose

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that the testator deliberately breached his contract, thus inviting lawsuits between his heirs and successors in interest. It is true that plaintiff had shown favors, if nothing more, to his father during his lifetime, and has also shown disadvantage to himself if the claimed contract is not carried out; but the relationship of the parties, and the motives which more often than the contrary explain such matters, must be taken into account. While there is direct testimony from plaintiff's wife as to the making of the alleged contract which is corroborated by other circumstances, there are many things which are undisputed that tend strongly to show that plaintiff did not think he had any binding contract with his father; but was relying upon his generosity to adequately provide

for him by will. With the difference between an actual binding contract and a purpose and intent to provide for a child by will, many of the conflicts in the testimony and of the apparent contradictions in the evidence may be explained. That testator at times expressed himself as intending to give the farm in controversy to plaintiff when he came to make his will we have no doubt, but even this purpose was conditional, and was not, of course, carried out. Testator's conduct was such that he evidently intended to retain control of practically all his property until his death, and then to dispose of it according to his then present desires. He retained control and active management of practically all his property down almost to the day of his death, and surely expected to bestow his bounties by will according to his then views regarding the claims his various heirs had upon him. When he made his will he either intentionally violated his contract and disposed of the property to another, thus inviting controversy between his children, forgot that he had made such a contract as is claimed, or never made it. These are the only possible explanations of the matter.

Moreover, testator evidently had in mind some provision for plaintiff; for he specifically devised some real estate to him, and gave the property in controversy to another. This is significant of the fact that he did not forget the plaintiff, but had him in mind, and in distributing his estate evidently weighed the claims which the various beneficiaries in the will had upon him. Plaintiff is in the somewhat unenviable position of claiming the land devised to him, and also insisting upon land specifically devised to others. Moreover, plaintiff joined in a contest of testator's will, and did nothing to defeat its specific provisions until he had been beaten in the trial court. It is shown that testator regarded the claims of the devisee to whom he willed the land as superior to those of plaintiff, and it is absolutely certain that, when he made his will, he did not

think that he had sold the land to the plaintiff or even at that time intended to give it to him. He evidently intended his favorite beneficiary to have the greater share of his property, and never imagined that plaintiff would not only secure this land, but also the tract which he gave him by will.

Again, it is shown that, after plaintiff moved upon the land in controversy, he became dissatisfied and threatened to leave it that he might be freed from the care of so much property. This he would not have done had he contracted to buy it as now claimed. Furthermore, it is shown, without controversy, that plaintiff paid rent for the use of the land in controversy, although it now clearly appears that he did not pay all that he agreed to pay. And a fact of great significance is that long after the alleged contract was made plaintiff tried to buy the farm in controversy from his father by paying him the amount which he, the father, had invested in it. Plaintiff admits the circumstance, but endeavors to explain it away by the suggestion that he made the offer to extinguish his father's life estate, and to secure the absolute title. At that time the father was old, and plaintiff was in the undisputed possession of the land, paying but a nominal rent for it, and it is hardly reasonable to suppose that he intended to pay more than \$10,000, to secure the absolute title, if, as now appears, the testator was not then making any claim in derogation of plaintiff's rights, whatever they may have been. Practically all the improvements upon the property were put there by the deceased, and plaintiff threatened to leave once at least if not more often because his father would not make other improvements. This does not comport with the notion that plaintiff had an enforceable contract for the purchase of the property. More significant than all else is the fact that, if disinterested witnesses are to be believed, plaintiff frequently stated that he had no present claim to the land in controversy, that,

at most, he hoped to get it when his father made a disposition of his property by will. Again, it is shown that plaintiff failed and refused to make any substantial or permanent improvements upon the land for the reason that both he and his wife, the latter being plaintiff's most important witness, frequently stated that they did not know whether they would ever get it or not. These statements clearly indicated that they were relying not upon any contract, but upon testator's bounty. It is hardly to be supposed, if plaintiff had the contract which he claims, that he would have joined in the will contest which finally reached this court, and to which we have already referred, and it is strange that he did not attempt to enforce his alleged contract until he had been defeated in his effort to set aside the will. His claim in that contest was not that he owned or had a binding contract for the land in controversy, as he now insists; but that the defendant to whom testator devised the property unduly influenced the father and secured a specific devise of the land himself. These positions are entirely inconsistent, although in the will contest plaintiff herein introduced testimony not to show a contract, but a purpose on the part of testator to devise the land to him, which purpose was thwarted by defendant Boyson Ross, the party to whom the land in controversy was devised.

We have gone over the record with care, and are satisfied with the conclusion of the trial court. Indeed, were we in doubt regarding the exact truth, we should be disposed, in view of the heavy burden resting upon plaintiff, to give some effect to the findings of the learned trial judge.

The decree must be, and it is, *affirmed*.

In the Matter of the Estate of T. F. MARDIS, Deceased,  
E. E. ORRIS, Substituted Trustee for THE WINTEREST  
BRICK, TILE AND MATERIAL COMPANY, Plaintiff, v.  
HULDA ANN MARDIS, Executrix of the Last Will and  
Testament of T. F. MARDIS, Deceased, Defendant.

**Estates of decedents: CONTINGENT CLAIMS: APPROVAL OF EXECUTOR'S REPORT.** Where an executrix and sole legatee in her report objected therein to a contingent claim against the estate, solely on the ground that the estate's liability was uncertain and that she desired to close the estate, and was willing to assume personal liability on the claim to do so, the court should have protected the claim by approving the report subject to liability against the estate for any amount thereafter found due.

*Appeal from Madison District Court.*—HON. JAMES D.  
GAMBLE, Judge.

TUESDAY, OCTOBER 25, 1910.

THE opinion states the case.—*Reversed and remanded.*

*J. P. Steele*, for appellant.

*A. W. & Phil R. Wilkinson*, for appellee.

SHERWIN, J.—In July, 1907, the Winterset Brick, Tile & Material Company sold several thousand dollars of its bonds, all of which were secured by a trust deed upon its property. It was unable to place these bonds with only the security afforded by the trust deed, and, to enable said brick, tile and material company to negotiate the bonds, an association consisting of stockholders in the brick, tile and material company was organized, which was known as

the "Winterset Guarantee Association." This association and the individual members thereof severally guaranteed the collection of the bonds which bore their indorsement, and also guaranteed the payment of the interest thereon. T. F. Mardis was a stockholder in the Winterset Brick, Tile & Material Company, and he was also a member of the Winterset Guarantee Association, and one of the guarantors of the collection of the bonds. T. F. Mardis is now dead; he having died testate in April, 1908, leaving Hulda Ann Mardis, the defendant, his sole legatee. In May, 1909, J. H. Wintrobe, who was then trustee of the property of the Winterset Brick, Tile & Material Company, under and by virtue of the trust deed executed and delivered to secure the bonds issued by the company, filed a contingent claim against the estate of T. F. Mardis for the sum of \$11,000, with interest and accruing interest, as appeared by exhibits which were attached to the claim.

In his demand the trustee alleged the facts relative to the issuance of bonds by the Winterset Brick, Tile & Material Company and the guaranty of said bonds by the Winterset Guarantee Association and T. F. Mardis and others. It was also alleged that, according to the terms of the guaranty, the estate of T. F. Mardis would be liable for the principal and interest of said bonds after the property of the brick, tile and material company conveyed in trust to secure said bonds was exhausted, and that the claimant was unable to allege what amount, if any, the estate of T. F. Mardis would be called upon to pay, and he asked that the claim filed by him be treated as a contingent claim, and that the interest of the holders of the bonds be fully protected by an order of the court. Thereafter the defendant, Hulda Ann Mardis, as executrix of the will of T. F. Mardis, her husband, appeared and filed a report containing objections to the allowance of the trustee's contingent claim. As a part of such report and objections, she alleged that she was the executrix of her husband's will;



that her husband died testate; and that, upon her appointment as executrix, she entered upon the discharge of her duties as such; that, by the terms of her husband's will, she was named as his sole legatee; that she had paid all the expenses of administration, and was ready to make her final report, close up the estate, and be discharged if it were not for the fact of the filing of the contingent claim, to which we have already referred. She further alleged that the contingent claim grew out of the following state of facts, as she was informed and believed. She then alleged that the brick and tile company authorized an issue of bonds amounting to \$15,000, and that, in order to float said bonds, stockholders of the company, her husband being one of them, organized the Winterset Guarantee Association, and that the members of said guarantee association, including T. F. Mardis, her husband, guaranteed the collection of eleven notes of \$1,000 each. She further alleged that said bonds were also secured by a trust deed executed by the brick and tile company to Mr. Wintrode as trustee; that the trust deed was primary security for the bonds, being a first lien upon all of the property of the brick and tile company; that the said bonds would not mature until July 3, 1912; that the said contingent claim against the estate could not then be paid by her because it could not be determined whether said estate would ever be liable for any amount thereon. She further stated that the property of the brick and tile company covered by the trust deed to Wintrode would have to be exhausted before anything would become due under the guaranty; that she was informed and believed that the property of the brick and tile company was more than sufficient to pay off said bonds, and that she did not believe that this estate would ever be called upon to pay anything; that she further said that she was the sole legatee, and was then the owner of and held in her own right all the property of every nature and kind left by her husband, and that she was then ready

and willing, and then offered, to assume all the liabilities of said T. F. Mardis on said bonds. She then asked the court to order that the guarantee association, or the holders of the bonds, be required to accept her as security instead of the estate. At a later time, but before a final hearing was had, Mrs. Mardis withdrew her offer to sign an obligation assuming "the liabilities of T. F. Mardis to the Winterset Brick & Tile Company." Objections to the final report of the executrix were filed by the trustee, but we need not specifically notice them. Upon a hearing the trial court disallowed the contingent claim, approved the report of the executrix, and gave her a final discharge. A short time thereafter Mr. Wintrobe, the original trustee, died, and by proper order of the court the present trustee, E. E. Orris, was substituted, and has appealed.

The Code (section 3343) provides that "contingent liabilities must be presented and proved, or the executor or administrator shall be under no obligations to make any provisions for satisfying them when they accrue." The appellee defends this appeal upon the proposition principally that there was a failure of proof to sustain a contingent claim against the estate of T. F. Mardis. We are constrained to say that in our judgment there is not a particle of merit in said contention. The executrix herein in the report and objections to the claim admitted as solemnly as could well be admitted by a party to an action that all of the claims made by the trustees were valid, and that the estate might in the future be called upon to pay some amount upon said bonds. And the only objection made to the contingent claim at that time was that it was uncertain, and that the executrix wanted to close the estate, and was therefore willing to personally assume the payment of any amount which might in the future be found due on her husband's guaranty. Clearly nothing more was required, and on the pleading alone the court should have made some orders which would protect the

parties who have parted with their money on the faith on Mr. Mardis' guaranty. Nothing less will satisfy the demands of justice. An order should be made which will protect this contingent claim. It may be done by an approval of the final report subject to any amount that may hereafter be found due from the estate on the testator's guaranty.

The judgment of the trial court is reversed, and the case is remanded for an order in harmony herewith.—*Reversed and remanded.*

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OLIVE CHILDS, Appellee, v. GEO. H. ROSS, Sheriff,  
Appellant.

**Executions:** NOTICE OF OWNERSHIP: SUFFICIENCY. A notice of claim of ownership of property levied upon under execution is not fatally defective for failing to state the consideration paid for the property, where a previous notice was given by the seller of the property of his right under a contract of sale stating the purchase price, which claimant subsequently paid, thus succeeding to the rights of the seller; as the two notices taken together complied with the requirements of the statute.

*Appeal from Dallas District Court.*—HON. J. D. GAMBLE,  
Judge.

TUESDAY, OCTOBER 25, 1910.

ACTION for the recovery of personal property held by the defendant as sheriff under an execution against a third party. Verdict and judgment for the plaintiff. Defendant appeals.—*Affirmed.*

H. G. Giddings and W. H. Winegar, for appellant.

W. H. Fahcy, for appellee.

EVANS, J.—On May 25, 1909, the defendant, as sheriff of Dallas County, levied upon and seized an automobile under execution in his hands against E. N. Childs, the husband of the plaintiff. The plaintiff brought this action to recover the same as her own property. The facts appearing in the record are that the automobile in question was purchased by the plaintiff from a dealer, one Allen Cox, on May 8th preceding by a written order as follows: "Allen Cox. You are hereby authorized to enter my order for one model number 'S' as specified below for which I agree to pay the sum of \$550.00, same to be delivered f. o. b. cars at Perry, Iowa, on or before May 10, 1909. To pay as follows: \$85.00 payable on signing this order and balance \$465.00 payable when car is delivered. Specifications one Model S Ford Roadster, price \$550.00 with all equipments belonging to same." The automobile was delivered according to the order, but the deferred payment of \$465 was not paid at the time of such delivery, and had not been paid at the time of the levy by the defendant sheriff. Thereupon Cox served upon the sheriff a written notice of his rights under the above contract of sale. Thereafter the plaintiff paid to Cox the full balance of the purchase price, and thereby terminated his interest in such property. Thereupon she served a written notice upon the sheriff of her ownership of the property.

This notice was supported by her affidavit as follows: "I, Olive Childs, on oath do say that I am the absolute owner of the certain Model S Ford Roadster, automobile levied upon in the above-entitled cause as the property of E. N. Childs on or about May 25, 1909, that I acquired title thereto by purchase from Allen Cox on May 8, 1909, and that I have fully paid therefor, and that said E. N. Childs has no interest therein, all of which is true as I verily believe." Whether the above affidavit is sufficient compliance with section 3991 of the Code is the only ques-

tion presented for our consideration on this appeal. Its sufficiency is challenged by the defendant on the ground that it failed to state the consideration paid by the plaintiff for the automobile. Conceding that the affidavit of itself is not in strict compliance with the requirements of section 3991 in the respect urged, we think the defendant is in no position to complain of the defect. The notice previously served upon the defendant by Cox furnished him with full information as to the amount of the consideration to be paid by the plaintiff. By her payment to Cox after the levy she succeeded to all his rights as to such property. Regarding the two notices together, they complied with every requirement of section 3991. The judgment below is therefore *affirmed*.

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CLARKE WILLIAMS, Appellee, v. CLARKE COUNTY,  
Appellant.

**County bridges: PERSONAL INJURY: PROXIMATE CAUSE.** In this action for injury to plaintiff, who, while attempting to rescue his horse which had caught its foot in a hole in a county bridge, was thrown over the banister of the bridge and injured, it is held that his injury thus received was the proximate result of the defective bridge.

**Same: EXTENT OF INJURY: WHEN A QUESTION OF FACT.** Where experts disagree as to the nature of plaintiff's suffering and the character of his injuries the question of extent of the injuries becomes one for the jury.

*Appeal from Union District Court.*—HON. H. M. TOWNER,  
Judge.

TUESDAY, OCTOBER 25, 1910.

ACTION at law to recover damages for personal injuries received by plaintiff due to a defective county bridge. De-

defendant denied the allegations of the petition and pleaded contributory negligence on the part of plaintiff. On the issues joined the case was tried to a jury, resulting in a verdict for the sum of \$14,500. On defendant's motion for a new trial this was reduced to \$12,000, and both parties appeal. Defendant will be called appellant. *Affirmed.*

*Lloyd Thurston and Maxwell & Maxwell, for appellant.*

*M. L. Temple, W. S. Hedrick, and V. R. McGinnis, for appellee.*

DEEMER, C. J.—This is the second appearance of the case in this court. The opinion on the first appeal will be found in 143 Iowa, 328, to which reference is made for a statement of the facts. The verdict on the first trial was for \$15,000. On the second trial the jury made answer to some special interrogatories, which are shown by the following excerpt from the record:

(1) Did J. W. Drennen, a member of the defendant's board of supervisors, in December, 1905, inspect and examine the bridge at which plaintiff was afterward injured? Answer: Yes, he did at that time.

(2) If you answer the above question in the affirmative, did said Drennen make such inspection and examination in a reasonably careful manner? Answer: Yes.

(3) As a result of such inspection and examination, if you answer the said Drennen made one, did he direct that said bridge be repaired with respect to one cap and the flooring? Answer: Yes.

(4) Was said bridge afterwards, and during the spring and summer of 1906, repaired as respects one cap and the flooring by Mr. Squire, Mr. Booth, and Mr. Collier, workmen in the employ of the county? Answer: Not in full according to the instructions.

(5) Did said Drennen, as a member of defendant's board of supervisors, in July, 1906, after the bridge had

been repaired with respect to the cap and flooring, inspect and examine said bridge? Answer: He did partially.

(6) If you have answered the last question in the affirmative, did said Drennen make such inspection and examination in a reasonable and careful manner? Answer: No.

(7) Did plaintiff voluntarily get out of the wagon and go into the space between the mare whose foot had broken in through the plank and the east banister of the bridge? Answer: No.

(8) Was plaintiff, while near the east side and banister of the bridge, struck in or on the breast by the struggling mare, and thus knocked or thrown over the banister of the bridge to the ground below? Answer: Yes.

Defendant relies upon the following propositions for a reversal of the judgment: (1) That the verdict is without support in the testimony. (2) That the answers to special interrogatories Nos. 4, 5, and 6 are contrary to the evidence and unsupported thereby. (3) That verdict as modified by the court and the judgment as rendered are excessive. (4) That the defect in the bridge was not the proximate cause of plaintiff's injury.

The first three of these propositions are questions of fact, and the last presents a question of law. We shall first dispose of the question of law. The manner of the accident is sufficiently shown by the answers

1. COUNTY  
BRIDGES: per-  
sonal injury:  
proximate  
cause.

to 7 and 8 of the special interrogatories, which answers are not complained of. From these it appears that plaintiff's horse got its foot caught in a hole in the bridge, which for the purpose of this decision we must assume was due to the negligence of the defendant; that plaintiff got out of his wagon and attempted to rescue his horse, passing between the horse and the banister on the bridge, and while in that position was struck in the breast and knocked or thrown over the banister to the ground below, receiving the injuries of

which he complains. Were these injuries the proximate result of the defect in the bridge? To that interrogatory there can be but one answer, in view of the findings made by the jury. It is hardly necessary to cite authority on so plain a proposition, but see *Burk v. Creamery Co.*, 126 Iowa, 730; *Phinney v. Ill. Central*, 122 Iowa, 488; *Langhammer v. City*, 99 Iowa, 295; *Gould v. Schermer*, 101 Iowa, 582; *Harvey v. Clarinda*, 111 Iowa, 528; *Osborn v. Van Dyke*, 113 Iowa, 557; *Rice v. Whitley*, 115 Iowa, 748.

II. On the former appeal we held that there was sufficient evidence of defendant's negligence to take the case to a jury. There was no such change in the testimony on the second trial as to justify another conclusion. Indeed, the opinion on the former appeal made the law of the case, and must now be followed upon this proposition. It is not for us to say what verdict should have been returned on the evidence as a whole. Our inquiry is confined to the proposition: Was there enough testimony to take the case to the jury on the question of defendant's negligence? That was heretofore determined on the first appeal. However, were it now an open question, we should arrive at the same conclusion.

III. The answers to the several interrogatories also have support in the testimony. We shall not quote from the record in support of this conclusion, as to do so would subserve no useful purpose.

IV. The extent of plaintiff's injuries was a matter of serious dispute. Experts disagreed as to the nature of his suffering and the character of his wounds. This question was also for the jury, and the verdict returned indicates the view taken by it of the nature and extent of plaintiff's injuries.

2. SAME: extent of injury: when a question of fact.

Defendant suggests that plaintiff is suffering from



traumatic hysteria. This, however, is recognized by physicians as a disease of the nervous system from which recovery is by no means certain or speedy. So long as it exists, conditions remain as found, notwithstanding the mind has much to do with them. This whole matter in view of the conflicting testimony, was for the jury. We are quite sure that plaintiff is not simulating. Indeed, defendant's experts do not so claim. They say, however, that his trouble is hysterical. Even such a complaint is often most serious in its results.

Connected with this claim as to the extent of plaintiff's injuries is defendant's contention that the verdict as modified and the judgment as rendered are excessive. The verdict on the first trial was for \$15,000, and on the second for \$14,500, and the last was reduced to \$12,000. In view of the wide latitude given the jury by the testimony as to the character, extent, and permanence of plaintiff's injuries, together with the suffering, past, present, and future, we think the verdict as finally reduced should not be disturbed. Cases are of but little help upon such a proposition, but see *Collins v. City*, 35 Iowa, 432; *Cooper v. Mills County*, 69 Iowa, 350; *Pence v. Railroad Co.*, 79 Iowa, 389; *Huggard v. Refining Co.*, 132 Iowa, 724.

V. Plaintiff appeals from the order reducing the amount of his verdict. In view of the wide discretion lodged in the trial court in such matters, we are not justified in interfering with this reduction. Moreover, plaintiff consented to the reduction rather than to take a new trial, and he is in no position now to complain.

Plaintiff also filed a motion asking us to assess a penalty because this appeal is frivolous and without merit. This we are not disposed to do. The interest on the judgment for the time the appeal has been pending is no small amount, and in addition defendant must pay all the costs of the appeal. Counsel for defendant are

not given to taking frivolous appeals, and we have no reason to doubt their good faith in this case. For these reasons the motion for a penalty will be, and it is, overruled.

No error appears, and the judgment is on both appeals *affirmed*.



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TO

ADULTERY

**ABSTRACTS OF TITLE.** See **REAL PROPERTY.**

**ACTIONS.** See **INSURANCE.**

**Dismissal of action for default: What matters concluded thereby.** Where the defendant in an action of replevin failed to take issue on the question of ownership of the property, a judgment of dismissal of the action because of plaintiff's failure to make his petition more specific was not a bar to a subsequent action to determine the title to the property; as the only question determined in the former action was the right of possession. *Peterson v. Kissell*, 516.

**Forms of actions: Distinction: Abatement.** While the distinction between forms of actions has been abolished by the code, the distinction between actions at law and suits in equity still remains; and the abatement of an action at law for want of proper parties will be determined by the rules applicable to ordinary proceedings. *Searles v. Life Ins. Co.*, 65.

**Misjoinder of legal and equitable causes: Waiver of error.** Where an independent action is subsequently brought upon certain counts of a petition embracing also equitable causes of action against the same defendants, and by stipulation the cases are consolidated and no motion is made to transfer the legal causes to the law docket for trial, any error in refusing to strike the counts from the original petition because of a misjoinder of legal and equitable actions was waived. *Sullivan v. Kenney*, 361.

**Removal of causes.** Where the federal court has determined that a cause is not removable from the state court and remands it the defendant is not entitled to a second order of removal, and therefore can not insist upon the postponement of the trial in order to prepare a petition for removal. *DeLashmutt v. Railway*, 556.

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AGENCY

TO

APPEAL

**AGENCY.**

**Brokers: Agreement to share commissions: Evidence.** In this action by one real estate broker to recover a portion of the commissions received by another broker, in consideration of the privilege granted defendant to use plaintiff's office for the transaction of business, the evidence is held sufficient to authorize recovery. *Reynolds v. Pray*, 213.

**Same: Acceptance of proposition to divide commissions.** Where, as in this case, plaintiff alleged an express promise of defendant to divide commissions arising out of business secured through plaintiff's office, in consideration for the use of his office, acceptance of the proposition will be inferred from a continued enjoyment of the privilege without an express allegation of acceptance. *Idem.*

**Brokers: Recovery of commission: Evidence.** In this action to recover commission for the sale of land the evidence is held insufficient to show that plaintiff made the sale or produced a purchaser, and he is not entitled to recover. *Kramer v. Land Co.*, 721.

**Principal and agent: Contract by agent: Undisclosed principal: Evidence.** One who sues as an undisclosed principal on a contract purporting to have been made by his agent in the agent's name has the burden of proving the agency, and that in making the contract the agent was acting for him. In this case a wife brought suit for breach of a contract made by her husband with defendant, and the evidence is held insufficient to show that the husband was acting for plaintiff in the transaction as an undisclosed principal. *Shields v. Coyne*, 313.

**Same: Rights and liabilities of undisclosed principal.** Ordinarily an undisclosed principal may sue and be sued for the breach of a contract made by an agent for his benefit but in the agent's name; yet if the party contracting with the agent without knowledge of the agency does so because of some personal trust or confidence in the agent, and the contract remains executory, the undisclosed principal can not enforce the agreement in his own name. *Idem.*

**ARGUMENT.** See **NEW TRIAL.**

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**Abstracts: Amendment.** Where appellant's original abstract did not contain the record, and it did not appear until the filing of appellant's argument that a part of the record containing the peti-

**APPEAL Continued**

tion for removal of the cause and the orders with respect thereto would be necessary to a solution of the question presented on appeal, the appellee could amend his abstract by embodying therein the proceedings and orders for removal. *DeLashmutt v. Railway*, 556.

**Abstracts: Undisputed evidence.** The evidence as disclosed by appellant's abstract, which is not disputed by appellee, will stand as correct. And where no corroborating evidence is shown in a prosecution for rape, a verdict of guilty will not be upheld. *State v. Heft*, 617.

**Argument.** Under the Supreme Court rules appellant is not permitted to reserve the citation of authorities for his reply argument. *Fisher v. Bolton*, 651.

**Argument: Objection to evidence.** Appellant is required to disclose in his opening argument the points relied upon for a reversal; he can not raise new points in his reply. Nor can an objection to the competency of evidence not made on the trial be urged on appeal, or advanced for the first time on appeal in a reply argument. *Idem*.

**Argument: Motion to strike.** Where the appellant files his argument and assumes the burden before any argument or notice is due from the appellee, the appellee's argument will not be stricken because not filed in time, or because appellee had given no notice that he intended to waive his opening argument. *Miller v. Kramer*, 460.

**Same: Review of interlocutory orders.** On appeal from a final decree interlocutory orders properly excepted to will be reviewed. *Idem*.

**Amendment of record.** Where the record on appeal shows an appealable judgment an amendment of the record to show that the judgment was not entered on the journal until after the appeal was taken will not affect the appeal. *Cantonwine v. Bosch Bros.*, 496.

**Notice: Sufficiency.** A notice of appeal addressed to the appellee and his attorneys, service of which is accepted in writing by the clerk of court, when filed in his office is sufficient, even though the notice is not addressed to the clerk. *Bloom v. Sioux City Traction Co.*, 452.

**Record: Judgment.** In criminal cases there can be no appeal except from a final judgment; so that where the record fails to

## APPEAL Continued

## TO

## BANKS AND BANKING

show either an indictment or judgment, and the abstract recites that after a verdict of guilty defendant was given time to move in arrest of judgment and for a new trial, but failed to show any ruling on the motion or exception taken, except as to a ruling on the motion to direct a verdict, the appeal was not sustainable. *State v. Young*, 629.

**Review of questions not urged below.** Where a party proceeds to trial on the merits without objection, after the cause has been reinstated and the trial ordered, the successful party can not urge on appeal that the court had no jurisdiction because there was nothing before it for trial. *Hickey v. Webster County*, 337.

**Same: Notice: Sufficiency.** A notice of appeal addressed to and served upon the attorneys appearing for all defendants and appellees in the trial court is sufficient. *Idem*.

**Stay of proceedings.** An appeal does not stay proceedings on the judgment appealed from except a *supersedeas* bond is given; and a provision in a decree of foreclosure suspending process and sale pending an appeal is not effective. *Boynton v. Church*, Judge, 197.

**Same: Review of erroneous order.** The court has jurisdiction in the matter of a stay of execution and though its order may be erroneous there is an adequate remedy by appeal, and hence the error is not reviewable by *certiorari*. *Idem*.

**Same: Discretion.** Although the matter of staying proceedings pending appeal might be discretionary, in the absence of statutory regulation, still this is not true where the precise method for staying process is prescribed by the statute. *Idem*.

**ASSAULT.** See MASTER AND SERVANT.

**ATTACHMENTS.** See LIMITATION OF ACTIONS.

**ATTORNEYS FEES.** See PARTITION.

## BANKS AND BANKING.

**Action for the value of property left for safekeeping: Evidence.** In this action for the value of notes left with a bank for safekeeping, a paper in the handwriting of the cashier, with whom the transaction was made but who died prior to the trial, and which was given plaintiff at the time of making a deposit of funds and one of the notes, and which showed that at that time plaintiff had in the bank cash and notes, was admissible in evi-

## BANKS AND BANKING Continued

TO

## CARRIERS

dence as an admission, if not as a formal receipt, although not signed by the cashier. *Barnett v. First Nat. Bank*, 667.

**Same: Estoppel.** The mere fact that plaintiff in this action had stated to the receiver of the bank upon its insolvency, and to the comptroller of the currency, that the cashier was acting for plaintiff individually and not as agent for the bank and was advised that plaintiff was not entitled to file her claim against the bank, did not amount to an estoppel of the right to so assert the claim, where it was not shown that the receiver changed his course or relied upon the statement. *Idem*.

**Same: Evidence: Sufficiency.** The showing of a deposit of the notes and money and failure of the bank or its managing officer to return the same made a *prima facie* case, and established a liability therefor, in the absence of a showing of loss thereof not the result of defendant's negligence, regardless of the question of care required. *Idem*.

**BONDS.** See **APPEAL**.

**BROKERS.** See **AGENCY**.

**BURGLARY.** See **CRIMINAL LAW**.

**CARRIERS.**

**Interstate commerce: What law governs.** The determination of whether a transaction constitutes interstate commerce so as to take it out of the control of a state law involves a construction of the federal Constitution and statutes, and state courts are bound thereby, and by the construction placed thereon by the United States Court. *State v. Eckenrode*, 173.

**Same: Original packages: Misbranded articles: Pure food statute: Enforcement.** Congress has provided regulations relating to the sale of original packages of misbranded articles imported from one state to another: So that where, as in this case, a company ships from another state to an agent in this state only such goods as are ordered by purchasers, placing several packages in a box, and the agent receives and opens the box, delivers the packages to customers according to their previous orders, the same being delivered in the form the company received them from the manufacturers, the transaction as a whole constitutes interstate commerce and is not subject to the pure food law of this state relating to misbranded packages; and the agent in delivering the packages to customers is not liable for a violation of the pure food law of this state. *Idem*.



CHATTEL MORTGAGES

TO

CONTEMPT

**CHATTEL MORTGAGES.**

**Description of property.** The description of the property involved in this action as, "one Schiller piano," is held to have sufficiently identified the property as against the seller who had not recorded his contract of sale, since he was not a subsequent purchaser without notice. *Swayne v. Tillotson*, 501.

**Same: Extrinsic evidence.** As between the parties, except attaching creditors or subsequent purchasers without notice, the description in a chattel mortgage may be aided by extrinsic evidence. *Idem*.

**COLLATERAL INHERITANCE TAX.** See **TAXATION**.

**COMPROMISE AND SETTLEMENT.**

**Repudiation.** One against whom a claim is made may buy his peace at any price he sees fit to pay, and the mere fact that he subsequently concludes that he acted rashly or even foolishly will not authorize him to repudiate the settlement, even though the claim made against him was without foundation. *Cantonwine v. Bosch Bros.*, 496.

**CONDEMNATION OF PROPERTY.** See **EMINENT DOMAIN**.

**CONSTITUTIONAL LAW.** See **DRAINAGE—INTOXICATING LIQUORS**  
—**STATUTES**.

**COSTS.**

**Taxation of costs on appeal.** Where the record on appeal contains a large amount of printed matter which could have been materially condensed, the cost of printing will be taxed on the latter basis. *Hawk v. Day*, 47.

**Taxation of costs: Discretion.** Where the court, in an action to cancel conveyances and to subject property to the lien of a judgment, granted the plaintiff partial relief, there was no reversible error in taxing all the costs against the defendant, although the court in its discretion might have apportioned the costs. *Lane-Moore Lbr. Co. v. Bradford*, 578.

**CONTEMPT.** See **INTOXICATING LIQUORS**.

**Former jeopardy.** A prosecution for contempt is not a criminal proceeding in the sense that one discharged from liability in such

## CONTEMPT Continued

TO

## CONTRACTS

a proceeding may not be again tried or punished for the same act.  
*Gibson v. Hutchinson*, Judge, 139.

**Same: Judgment: When void.** A judgment for contempt which is entered before the evidence upon which it is based has been filed, either by filing the shorthand notes or transcript of the same, is void. *Idem*.

**CONTRACTS.** See **REAL PROPERTY.**

**Building contract: Waiver of defects.** Where the owner of a building examines and inspects the same while in progress of construction, and with full knowledge of the material used and character of the work done makes payments to the contractor and gives him a note in settlement of the balance due, he can not thereafter counterclaim in a suit upon the note for damages because of inferior work and material. *Houlette & Miller v. Arntz*, 407.

**Same: Damages: Evidence.** The giving of a note, as in this case, for a balance due a contractor under his building contract is *prima facie* evidence of a settlement of all matters pertaining to the contract; and to sustain a counterclaim for damages in a suit upon the note because of defects in the work, the owner must not only establish the defects but he must also show that the settlement was made without notice or knowledge of the defects, and without reasonable opportunity to discover the same. *Idem*.

**Evidence.** In this action for the price of goods manufactured for defendant the correspondence of the parties is held to constitute a binding contract. *Morgan & Wright v. Sutlive Bros.*, 318.

**Same: Submission of issue.** Where the whole contract for the manufacture of goods was embodied in the correspondence between the parties, as in this case, and was that plaintiff should give defendants' orders for goods their best attention, it was error for the court to submit to the jury the question of what plaintiff agreed to do, in an action by them for the price of goods delivered. *Idem*.

**Breach of contract: Recovery upon counterclaim: Instruction.** Where plaintiffs' contract for the manufacture of goods was embodied in the correspondence of the parties, which conclusively showed that plaintiff was simply to give defendants' orders their best attention, an allowance by the jury upon defendants' counterclaim for delay in delivery was unauthorized, in the absence of

## CONTRACTS Continued

any evidence of a breach of the contract, and was a violation of an instruction that to recover upon the counterclaim defendant must show by a preponderance of the evidence that plaintiffs failed to comply with their agreement. *Idem.*

**Same: Submission of issues: Undisputed evidence.** Where but one finding on a question of fact is possible under the evidence the issue should not be submitted to the jury. Thus where defendant in an action for the price of manufactured goods counterclaimed for delay in delivery, and the correspondence between the parties showed conclusively that defendant had canceled his order and that plaintiff had assented thereto, it was error to submit the question of cancellation. *Idem.*

**Same.** The acceptance by a buyer of a delayed shipment of goods is not necessarily inconsistent with a claim for damages caused by such delay, but is inconsistent with a claim for damages for complete loss of profits upon all the goods ordered. *Idem.*

**Breach of contract: Waiver of damages.** Where a buyer of manufactured goods to be shipped in installments requests a cancellation of his contract and all outstanding orders, which is assented to by the manufacturer, and in response to a statement of the balance due from him forwards his check in settlement he waives any claim for damages growing out of delay in delivery of the goods, and can not plead such damages as a counterclaim in a suit for the price of goods subsequently ordered and received. *Idem.*

**Exchange of property: Replevin: Rescission: Tender.** In an equitable action to recover property given in exchange for other property a tender in the petition of a return of the property received is timely, and the commencement of the action is a sufficiently definite disaffirmance of the contract of exchange and election to rescind; but in a law action the plaintiff's right of recovery must have been perfect in this respect when the action was begun. *Rose v. Eggers*, 306.

**Same: Waiver of tender.** On the rescission of a contract of exchange of property a formal tender of the property received by plaintiff may be waived; and to constitute such waiver it is only necessary to show that if the tender had been made it would have been unavailing. And where the defendant refused to take back the property, not however on the ground that plaintiff had incurred it, it was not essential for plaintiff to make a new tender after relieving it of the incumbrance, before instituting his action. *Idem.*

## CONTRACTS Continued

**Same: Waiver of tender: Submission of issue.** Where a party undertakes to rescind a contract for the exchange of property and has no claim to the property received except by virtue of the contract, an offer to return the property received unless waived is a condition precedent to the right to maintain the action. *Idem.*

**Same: Exchange of property: Fraud: Rescission.** A contract for the exchange of personal property induced by fraud is voidable only, and the injured party may affirm it and sue for damages or he may disaffirm it and demand a return of the property with which he has been wrongfully induced to part, but if he elects to rescind he must return the property received. *Idem.*

**Same: Former adjudication: Exclusion of evidence: Prejudicial error.** Plaintiff and defendant in this action exchanged horses and plaintiff sought to rescind the contract on the ground of fraud and brought replevin to recover the horse he transferred to the defendant. One of the grounds of rescission was that defendant did not own the horse traded to plaintiff at the time of the exchange. Defendant pleaded an adjudication in a replevin suit brought by a third person against plaintiff to recover possession of the horse in which plaintiff was successful, and no reply was filed to this answer. All evidence which tended to show that defendant was not the owner of the horse was excluded because of the adjudication in the former suit. *Held*, that the question of whether there was an adjudication such as pleaded was in issue and the court should not have assumed an adjudication and excluded the evidence; and this error was not cured by the concession of counsel for plaintiff that in the former suit the third person claimed the horse under an alleged purchase from the person from whom defendant derived title, and that plaintiff held title, if any, under defendant, where it appeared that no pleading was filed by defendant in the former action and the plaintiff in that action was not present at the trial. *Idem.*

**Restraint of trade: Evidence.** In this action for breach of contract of the sale of a business with an agreement not to re-engage therein, the question of whether the agreement not to re-engage in the business was made for the purpose of advancing a combination to control prices is held under the evidence to have been for the jury. *Canfield Lbr. Co. v. Kint Lbr. Co.*, 207.

**Same: Parol evidence of agreement.** A contract may be partly in writing and partly in parol, and where a conflict is not thus presented or the same subject covered, parol evidence is admissible to show the entire agreement. *Idem.*

## CONTRACTS Continued

TO

## CORPORATIONS

**Same: Breach by one party: Disaffirmance by the other.** Where a contract partly written and partly oral is not severable and one of the parties refuses performance on his part the other may also disregard and disaffirm it; he is not required to sue for the other's breach. *Idem.*

**Same: Instruction.** An instruction in this action regarding defendant's right to disaffirm the contract upon plaintiff's breach thereof is held to have been correct. *Idem.*

**CONVEYANCES.** See HOMESTEADS.

**Consideration.** Where a conveyance recites a consideration of \$1 and love and affection, extrinsic evidence is admissible to prove an additional consideration. *Chantland v. Sherman*, 352.

**Fraud: Findings of court: Conclusiveness.** The finding of the trial court that the deed involved in this action was delivered, that the grantor was mentally competent to execute it, and that it was valid as to him, was of necessity a finding against the contention that the deed was executed through fraud. *Miinch v. Miinch*, 18.

**Same: Consideration: Mental capacity of grantor: Evidence.** In this action the sons of grantors remained at home with their parents for several years after their maturity and until they were married, working and improving their father's farm and from the income of the farm, as a result of their labor, purchased other land. By an agreement with the sons to pay them a certain amount annually and to otherwise provide for them the parents executed conveyances of the land to the sons.

**Held,** that there was sufficient consideration for the conveyances; and also that the conveyances were valid as against a claim of mental incapacity of the mother at the time of the execution of the same. *Idem.*

**Same: Delivery.** Where the wife voluntarily joins the husband in the execution of a deed its delivery by him is effectual as against the wife. *Idem.*

**CORPORATIONS.**

**Evidence: Corporate capacity: Sufficiency.** In this prosecution for malicious injury to the property of a corporation the evidence is held sufficient to show corporate capacity. *State v. Smith*, 640.

COURTS

TO

CRIMINAL LAW

**COURTS.**

**Judicial notice.** The court will take judicial notice of all papers regularly issued, filed and returned in the case; as a writ of attachment or the return of the officer thereon, without its formal introduction in evidence. *Slater v. Roche*, 413.

**Same.** Courts will take judicial notice of the geography of the state, and that a point five miles from a given city is in a certain county; but can not judicially know that a given farm is within such county. *State v. Heft*, 617.

**CRIMINAL LAW.**

**Adultery: Institution of prosecution.** Where the record on a prosecution for adultery shows that defendant's wife consulted the county attorney with the view of commencing prosecution, and that she went before the grand jury without subpoena for that purpose, there was a sufficient showing that the prosecution was instituted by the wife. *State v. Young*, 629.

**Burglary: Breaking and entering: Evidence.** The crime of burglary may be committed although the purpose of breaking and entering was not accomplished. In this action the evidence is held to justify a finding that the purpose and intent of defendant in entering the building was burglary.

It is also held sufficient to sustain a finding that defendant broke and entered the building. *State v. Baker*, 149.

**Forcible defilement: Election of offenses.** In prosecutions for rape the state may be required to elect which of two or more acts it will rely upon; but under an indictment for forcible defilement, the gist of the offense lies in obtaining unlawful control over the person of prosecutrix, and by means of the force, menace or duress thus exercised accomplish her defilement, which need not necessarily be the result of force. So that all the acts of defilement during the continuance of the duress constitute one continuous transaction, and can be proven under one indictment. *State v. Dean*, 566.

**Same: Previous chaste character: Instruction.** Where the court in a prosecution for forcible defilement told the jury to consider the evidence of previous chaste character of prosecutrix, on the questions of unlawful taking against her will and whether she was actually defiled, failure to specifically instruct on the question of whether she consented to the intercourse was not erroneous. *Idem*.

## CRIMINAL LAW Continued

**Forgery: Evidence: Alibi.** In this prosecution for uttering as true a forged instrument the evidence is held insufficient to support the defense of alibi. *State v. Flood*, 146.

**Same: Evidence: Act of coconspirator.** Where there was evidence tending to show a common plan and conspiracy between the defendant and another to pass as true a forged check, evidence that such other person had passed a similar check to another party was admissible as against defendant. *Idem*.

**Rape: Indictment: Duplicity.** An indictment charging assault and rape on a female under fifteen years of age is not subject to the objection that it charges two offenses; as the age of the female precludes consent, and if the crime was committed against her will there would be an assault in fact. *State v. Heft*, 617.

**Same: Reasonable doubt as to the degree of an offense: Instructions.** Where there is reasonable doubt of the degree of the offense of which a defendant has been proven to be guilty, he can, under the statute, only be convicted of the lower degree; and he is entitled to an instruction to that effect. In the instant case the instructions are reviewed and, as the result of an equal division of the court, are held to satisfy the requirements of the statute. *Idem*.

**Seduction: Action for damages: Instruction.** Where it is established by the evidence in a civil action for seduction that plaintiff was unchaste prior to a certain date, an instruction that she could not recover unless she had reformed between that time and the date of a subsequent alleged seduction, was more favorable to defendant than he was entitled to have given; as the rule stated by the court is applicable in criminal cases, but not to its full extent in civil actions for seduction. *Fisher v. Bolton*, 651.

**Same: Evidence: Previous relation of the parties.** In a civil action for seduction the previous relations of the parties may be shown as bearing on the question of influence and power of the defendant over the plaintiff which he might not otherwise have had; and is important in determining whether her yielding to the demands of defendant was inconsistent with previous chastity of character and purpose. *Idem*.

**Same: Promise of marriage: Evidence.** In a civil action for seduction a promise of marriage need not be proved in express terms or by direct evidence. Evidence held sufficient to warrant the jury in finding a promise of marriage as one of the artifices by which the seduction was accomplished. *Idem*.

## CRIMINAL LAW Continued

**Seduction: Damages: Instruction.** The instruction in this action relative to plaintiff's right to recover for loss of time is held to have been without prejudice, even though there was no evidence of loss of time on account of the seduction. *Idem*.

**Seduction: Instructions: Evidence.** The fact that prosecutrix testified on cross-examination that her seduction was accomplished solely by a promise of marriage did not preclude the jury from considering her testimony as a whole on that subject, which disclosed protests of love and other acts not inconsistent with a marriage engagement; and instructions permitting the jury to consider other acts than that of a false promise of marriage were justified. *State v. Criswell*, 254.

## EVIDENCE.

**Competency of witness: Discretion.** The competency of a child as a witness is a matter largely within the discretion of the trial court, and unless abuse is shown its determination of the question will not be disturbed on appeal. *State v. Gregory*, 152.

**Credibility of evidence: Verdict: Passion and prejudice.** It is the province of the jury to determine the weight and credibility of evidence; and the fact that it may not credit the testimony of certain witnesses touching a fact essential to the defense does not necessarily show such prejudice and passion as will vitiate a verdict of guilty. *State v. Krumm*, 631.

**Evidence of moral character.** Under the statute the general moral character of a witness may be shown as bearing upon his credibility; and while the term "character" as used in the statute is equivalent to the term "general reputation;" still it is the general moral character of the witness which may be inquired into and not his general reputation unconnected with the question of moral character. *State v. Gregory*, 152.

**Hearsay evidence: Refusal to strike.** On this prosecution the state produced a witness on rebuttal for the purpose of showing that defendant's evidence of an alibi was untrue, and on cross-examination defendant developed the fact that the witness had verified her recollection of defendant's presence at her place on a certain date by conversation with another. *Held*, that defendant's motion to strike the evidence as hearsay was properly overruled, especially as the recollection of the witness was not based entirely upon the statements of such other party. *State v. Flood*, 146.

**Impeaching evidence.** Where it appeared from the evidence of a witness for the accused that he was a neighbor of prosecutrix



## CRIMINAL LAW Continued

and her mother and that he had seen strangers frequenting their home prior to the alleged seduction, it was proper to show on cross-examination, as tending to impeach him, that he had signed a writing in which he stated that he knew nothing immoral of either, that they were of good moral character and conducted themselves properly. *State v. Criswell*, 254.

**Statements of a confederate.** The statements of one engaged with defendant in the commission of a crime may be shown as against defendant, although made in his temporary absence. *State v. Dean*, 566.

## INDICTMENT.

**Sufficiency.** The caption of an indictment and the wording thereof do not affect its validity, and may be omitted; so that where the charging part of the indictment sufficiently charges the crime as committed by the defendant the caption is immaterial. *State v. Smith*, 640.

An indictment which charges an offense with such certainty and in such manner as to enable a person of common understanding to know what is intended is sufficient; and in this case the indictment charging defendant with malicious mischief is held to comply with the rule. *Idem*.

**Venue: Evidence.** Where an indictment alleges that the offense was committed at a certain farm in the county, and a witness testifies that the farm was about five miles distant from a certain city, and that she always supposed that it was in the county, but did not know, there was sufficient evidence to take the issue to the jury. *State v. Heft*, 617.

## INSTRUCTIONS.

**Cautionary instructions: Prejudice.** An instruction that the jury should not by their verdict lessen the protection the law throws arounds the innocent and virtuous female, nor in any degree disregard the legal rights of defendant, was not prejudicial as assuming that prosecutrix was innocent and virtuous. *State v. Dean*, 566.

**Included offenses.** Where the evidence is such that there would be no justification for conviction of an included offense should the jury fail to find defendant guilty of the principal crime charged, failure to instruct on the subject of included offenses is not erroneous. *Idem*.

**Submission of the issue of venue.** Where the court fails to enumerate the material allegations of the indictment, but simply instructs that the state must prove every material allegation be-

CRIMINAL LAW Continued

TO

DAMAGES

yond a reasonable doubt, there is a technical failure to properly submit the issue of venue. But under the record in this case the error is not sufficient to justify a reversal on that ground alone. *State v. Heft*, 617.

## PRACTICE.

**Reception of verdict: Absence of counsel.** There is no statutory requirement that counsel for defendant in a criminal case shall be present in court at the time the verdict is returned; but the court may receive the verdict and discharge the jury in the absence of counsel, and no legal right of the defendant is thereby invaded. *State v. Criswell*, 254.

## DAMAGES. See TORTS—WATERS.

**Excessive verdict.** In view of the serious doubt under the evidence as to whether defendant's negligence in operating upon the plaintiff caused the necessity for another operation, and of plaintiff's condition prior to the operation by defendant, the verdict of \$2,000 damages is reduced to \$1,200. *Reynolds v. Smith*, 264.

**Future pain and suffering.** Where the plaintiff's petition alleged pain, suffering, loss of time and permanent injury, and there was evidence tending to sustain the claim of future suffering, that question was properly submitted to the jury. *Bayles v. Savery Hotel, Co.*, 29.

**Same: Excessive verdict.** The plaintiff in this action was confined to the hospital for two months suffering much pain as the result of his injury, the physical signs of which at the time of the trial, however, consisted only of an extensive scar on the injured limb. *Held*, that the court's action in permitting a verdict for \$2,000 to stand should not be disturbed. *Idem*.

**Instruction: Value of crops.** The instruction that plaintiff was entitled to the reasonable market value of the crops destroyed by the flooding of his land, under the facts and circumstances shown, was proper. *DeLashmutt v. Railway*, 556.

**Loss of profits: Evidence.** Loss of profits as an element of damage are not to be rejected in all cases as necessarily uncertain and speculative; but where they are clearly uncertain, speculative, and not reasonably within the expectation of the parties, they can not be considered because incapable of adequate proof. In this action for the price of manufactured goods in which defendant counterclaimed for delay in delivery, the evidence is held to show that defendant's claim for loss of profits which would have

## DAMAGES Continued

TO

EQUITY

accrued had the goods been promptly delivered was too unreasonable and uncertain to constitute an element of damage, and that the same was not contemplated by the parties as an element of damage resulting from the delay. *Morgan & Wright v. Sutlive*, 318.

**Submission of issue: Harmless error.** Where the verdict should either have been for plaintiff in a stated sum or for defendant, and the jury allowed plaintiff less than such sum, the defendant was not prejudiced by the error, if any, in permitting the jury to determine the amount. *Reynolds v. Pray*, 213.

**DRAINAGE.** See **WATERS.****Constitutional law: Establishment of drainage districts: Notice.**

A legislative enactment will not be held unconstitutional unless it is plainly and palpably illegal. Under this rule the statute providing for the establishment of drainage districts upon notice by publication is not unconstitutional, as authorizing the taking of property without due process of law, because failing to provide for personal service upon residents of the county. *Johnson v. Story County*, 539.

**Surface water.** Lower lands are charged with the burden of taking care of the natural flow of surface water from the lands above; but a dominant proprietor can not materially increase this burden by ditching and draining other lands into a swale through which the surface water naturally flowed. *Trumbo v. Pratt*, 195.

**Same: Obstruction of surface water: Estoppel.** A dominant owner can not complain of the maintenance of a fence or water gate by the lower owner over a natural watercourse where the same enters his land, because it may impede the flow of rubbish and debris gathered by the water on the upper owner's land; and where such water gate or fence has been maintained by the lower owner for a long series of years in substantially the same manner the upper owner is on that ground estopped to complain of the same. *Idem*.

**DURESS.** See **FRAUD.****EQUITY.****Action to restrain the sale of land: Denial of relief: Equity.**

Where the plaintiff in an action to restrain the sale of land under a judgment against his vendor, admits by demurring to the an-

**Equity Continued**

swer that in purchasing the land he assumed to pay the judgment and retained from the purchase price a sum sufficient for that purpose, but failed to pay the judgment, though still retaining the money, he will be denied affirmative relief, under the rule that he who asks equity must be willing to do equity. *Richardson v. Roberts*, 345.

**Judgments: Enforcement: Appearance.** Although a plaintiff may not be entitled to maintain a suit in equity to have a judgment declared a specific lien on property, still, where the defendant appears and demurs to the petition jurisdiction over his person is conferred, although there was no prior service of notice; and he may have the action transferred to the law docket for trial rather than dismissed. *Mudge v. Livermore*, 472.

**Specific performance: Agreement to devise: Sufficiency of evidence.** In this action to enforce an agreement to will property to plaintiff, or to cancel conveyances made to defendant in consideration of such an agreement, the evidence is reviewed and held sufficient to establish the agreement. *Chantland v. Sherman*, 352.

**Specific performance: Evidence.** Specific performance of a contract for the sale of land, where the vendor is dead, will only be declared upon clear, satisfactory and convincing evidence; and although established it will not be enforced unless equitable. *Ross v. Ross*, 729.

**Same.** The oral admissions of a decedent are not as a rule satisfactory evidence in support of an action to specifically enforce his contract to convey land. *Idem*.

**Same.** To enforce specific performance of a contract it must be established substantially as claimed; and the contract must be mutual so that it could have been enforced by the vendor. It may be established by circumstantial evidence, but the circumstances must be clear and satisfactory and not explainable on any other theory equally as consistent. *Idem*.

**Same.** The relationship of the parties is a cogent circumstance, and the interests of the several witnesses should be carefully considered in an action to enforce specific performance. *Idem*.

**Same.** In an action by a son to enforce performance of an alleged oral contract of his deceased father to convey land to him, the burden of establishing the contract is on him; and in this action the evidence is reviewed and held insufficient to warrant a decree of specific performance. *Idem*.

EMINENT DOMAIN

TO

ESTATES OF DECEDENTS

**EMINENT DOMAIN.** See **HIGHWAYS.**

**Board of Park Commissioners: Abandonment of proceeding: Damages.** A board of park commissioners has power to condemn property for public purposes under the law relating to the taking of property for public improvement, is an instrumentality of government, and in the absence of statute is not liable in damages to private individuals for an exercise or nonexercise of its powers, as for the abandonment of condemnation proceedings, not unreasonably delayed, whether acting negligently or maliciously. But under the express provision of our statute relating to condemnation proceedings and providing that if a corporation declines to take the property and pay the damages awarded on final determination of the proceeding, it shall pay in addition to the costs and damages suffered reasonable attorney's fees, damages may be recovered by the landowner on the abandonment of condemnation proceedings instituted by the board of park commissioners against his land. *Ford v. Ford*, 1.

**ESTATES OF DECEDENTS.** See also **WILLS.**

**Contingent claims: Approval of executor's report.** Where an executrix and sole legatee in her report objected therein to a contingent claim against the estate, solely on the ground that the estate's liability was uncertain and that she desired to close the estate, and was willing to assume personal liability on the claim to do so, the court should have protected the claim by approving the report subject to liability against the estate for any amount thereafter found due. *In re Estate of Mardis*, 740.

**Executors and administrators: Accounting: Attorney's fees.** The allowance to an executor for attorney's fees in preparing his final report and securing his discharge is within the discretion of the trial court. And the fact that a report had been filed and an order of discharge entered was not conclusive of this question, where the executor's account was subsequently opened up and in a further and final account there was an additional showing of receipts and disbursements. *Hamilton v. Hamilton*, 127.

**Exemptions.** Where it appeared that the exempt property set off to a widow was sold and accounted for the same as though it belonged to the estate and the proceeds were used in paying debts, the court properly refused to charge the widow with anything on account of the exempt property, on the theory that having accepted the provisions of the will she was not entitled to the exemptions. *Idem.*

## ESTATES OF DECEDENTS

## TO

## EVIDENCE

**Transactions with a decedent: Descent and distribution: Family agreement.** An heir of a decedent is disqualified under the statute to testify to an agreement with the widow, since deceased, which he had a part in making and was personally interested in, by which it was claimed that the widow agreed to accept a life estate rather than her distributive share in decedent's property. In this action the evidence is reviewed and held insufficient to establish an agreement between the widow and heirs of a decedent by which the widow was to accept a life estate in decedent's land in lieu of her distributive share. *Woodbury v. Henning*, 23.

**Same: Descent and distribution: Interest of widow.** Where a husband dies seised of real property, leaving a widow and children, the widow will take a one-third interest in the same in fee, which on her death will pass to her heirs. *Idem*.

**Same: Estoppel.** Where the heirs of a decedent had not shaped their conduct with reference to claimed admissions made by the widow that she owned simply a life estate in the property, neither the widow nor her heirs were estopped by such admission to claim that she took her distributive share in the estate in fee. *Idem*.

**ESTOPPEL.** See BANKS AND BANKING—DRAINAGE—ESTATES OF DECEDENTS.

**EVIDENCE.** In criminal cases, see CRIMINAL LAW. See also ESTATES OF DECEDENTS—PHYSICIANS—WILLS.

**Authentication of foreign judicial proceedings.** The authentication of judicial proceedings in a foreign state need not conform to the federal statute prescribing the requisites of such proof, provided the same is in conformity with the state law; which, however, can not make additional requirements but may provide for less proof than the federal statute requires. *Sullivan v. Kenney*, 361.

**Credibility of witness: Instruction.** Although a common test of the credibility of evidence is whether the same can be reconciled with the testimony of other witnesses, still, the court should not by instruction require the jury to reconcile the other evidence with impeached testimony in order to sustain it, if in doing so it is necessary to construe the credible testimony contrary to what the jury believes to be true. *Yeager v. Railway Co.*, 231.

**Conclusion.** Not every inquiry calling for a fact in the nature of a conclusion is incompetent. Thus in an action for the death of a switchman the testimony of a competent witness that it is

**EVIDENCE Continued**

the duty of an engineer in moving his engine to keep a lookout ahead for cars with which he may collide is proper. *Idem*.

**Cross-examination: Nonprejudicial error.** Where the plaintiff, as in this case, attempted to show by its president and managing officer a loss of business resulting from defendant's breach of contract, the overruling of an objection to a question on cross-examination tending to show that domestic troubles of the witness were responsible for plaintiff's loss of business was not prejudicial, in view of a denial of such trouble, even though the question may have been improper. *Canfield Lbr. Co. v. Kint Lbr. Co.*, 207.

**Cross-examination: Documentary evidence.** The cross-examination of experts need not be confined in asking hypothetical questions to the facts disclosed by the testimony; and the court has a wide discretion in determining the range of inquiry. Thus, in this action to set aside a will on the ground of mental incapacity, documentary evidence consisting of notes and the records of actions against the testator; sheriff's deeds, garnishments, warrants of arrest for violation of injunction; the record of the commitment of testator to an insane hospital; and deeds made by him to his children after the execution of his will, were admissible as part of his history and as bearing upon his mental condition. *Mileham v. Motagne*, 476.

**Construction upon appeal.** Where, as in this action, the defendant's testimony was conflicting as to whether the note sued upon was given after the work was fully performed, the appellate court will give such evidence the most favorable construction of which it is capable to support a verdict for plaintiff. *Houlette & Miller v. Arntz*, 407.

**Expert evidence: Instruction.** Where no hypothetical questions are put to experts an instruction that the jury must find the facts on which the expert opinions are founded is not necessary. *Reynolds v. Smith*, 264.

**Same.** An instruction that the jury must give to expert evidence only such credit as they deem it justly entitled to and must give it such weight as other evidence, taking into consideration the knowledge possessed by the witnesses testifying as experts, the matters testified to by them and the other evidence in the case, does not disparage expert testimony but cautions the jury against blindly accepting what the experts say, and is proper. *Idem*.

**Evidence of value: Harmless error.** Where a witness has testi-

**EVIDENCE Continued**

fied that he did not know the value of property it is error to permit him to state that the same was considered worth a certain sum; but under the facts of this case the admission of such evidence is held to have been without prejudice. *Thornburg v. Doolittle*, 530.

**Hearsay: Motion to strike.** A motion to strike evidence on the ground of hearsay, which is directed to the entire answer of a witness, part of which is competent, should be overruled; but where the motion points out the precise portion of the answer subject to the objection it should be sustained. *Reynolds v. Pray*, 213.

**Leading questions: Harmless error.** In this action for injury to plaintiff because of the alleged negligent operation of a street car, the plaintiff was asked a leading question, which was objected to, but the court without ruling upon the objection asked plaintiff a question, to which defendant excepted, but which plaintiff answered; and it is held that there was no error of which the plaintiff could complain, as the court's interrogatory was not objectionable, and it would be a rare case which would demand a reversal because of an unanswered leading interrogatory. *Dow v. Des Moines Ry. Co.*, 429.

**Objection: Review: Harmless error.** The discretion of the trial court in permitting leading questions will not ordinarily be interfered with on appeal: Nor will a cause ordinarily be reversed because of the reception of immaterial evidence, as the objection of immateriality is more for the protection of the court and the dispatch of business than for the benefit of litigants. In the instant case the evidence, though incompetent, is held to have been nonprejudicial. *Stotelmeyer v. Railway*, 278.

**Photographs: Conclusiveness.** Photographic evidence must be considered in connection with all of the evidence on the subject to which it refers, and is not in itself so conclusive that the testimony of witnesses in apparent conflict must be disregarded. *Idem*.

**Pleadings: Admissions.** Failure of a defendant to answer the allegations of a petition does not constitute an admission of the truth of the allegations, which is available in another action, unless such failure was made the basis of a default judgment; and in this action failure to answer the petition, which was dismissed before the expiration of the time for answer, was not such an admission. *Sawyer v. Kelly*, 644.



EVIDENCE Continued

TO

FRAUD

**Statements of witness on former trial: How proven.** The statute providing that a reporter's notes or a transcript thereof shall be admissible as a deposition for the purpose of proving the testimony of a witness on a former trial, does not exclude the evidence of one who heard and remembered such testimony, on the ground that the reporter's record is the best evidence. *State v. Dean*, 566.

**Transactions with a decedent.** The statute precluding evidence of a personal transaction between a witness and one since deceased does not apply to a mere agent of the real party in interest. *Barnett v. First Nat. Bank*, 667.

**When not conclusive.** The mere fact that plaintiff, alone, testified in support of the material allegations put in issue by the answer will not entitle him to have his evidence treated as conclusive on the issues. *Meardon v. Iowa City*, 12.

**EXECUTORS.** See ESTATES OF DECEDENTS.

## EXECUTIONS.

**Issuance against nonresident defendant.** Lapse of time is not an impediment to the issuance of an execution on a judgment, where the judgment defendant left the state shortly after its rendition and had not since been a resident. *Mudge v. Livermore*, 472.

**Same: Place of issuance.** Although a transcript of a judgment is filed in another county, execution thereon can only issue from the county in which the judgment was rendered. *Idem*.

**Notice of ownership: Sufficiency.** A notice of claim of ownership of property levied upon under execution is not fatally defective for failing to state the consideration paid for the property, where a previous notice was given by the seller of the property of his right under a contract of sale stating the purchase price, which claimant subsequently paid, thus succeeding to the rights of the seller; as the two notices taken together complied with the requirements of the statute. *Childs v. Ross*, 744.

**FORGERY.** See CRIMINAL LAW.

**FRAUD.** See CONTRACTS—CONVEYANCES—LANDLORD AND TENANT.

**Fraudulent conveyances: Trust and confidence: Undue influence: Presumption: Burden of proof.** Where a relation of trust and confidence is shown and it appears that the stronger and

**FRAUD Continued**

controlling mind has obtained the conveyance of property or acquired other pecuniary advantage, it will be presumed that such person exercised an undue influence to his own advantage; and the transaction will be set aside by a court of equity unless the beneficiary establishes by abundant proof that the transaction was free, fair and in the utmost good faith. *Sullivan v. Kenney*, 361.

**Fraudulent conveyances: Undue influence: Evidence.** In this proceeding to set aside conveyances of land from an aged father to his daughter, and to recover money turned over to her, the evidence is reviewed and held to show that the father was possessed of insane delusions and hallucinations materially affecting his mind, and that by reason of such fact the defendants were able to and did exercise an undue influence over the grantor in procuring the conveyance, and the transfer of the money. *Idem*.

**Fraudulent conveyances: Transactions between husband and wife: Evidence.** A debtor will not be permitted to use the name of his wife as a mere cover to conceal his own property; but in the instant case, involving the rights of a third party, the evidence is reviewed and held to show that the arrangement by which the wife acquired certain property was not a fraud upon the husband's pre-existing creditors, nor a sham as between husband and wife, and that the wife's right to the property could not be subjected to the payment of the husband's pre-existing debts. *Lane-Moore Lbr. Co. v. Bradford*, 578.

**Same: Rights of husband's creditors.** The evidence in this action also disclosed that the husband transferred certain notes and mortgages to a creditor as collateral, and that subsequently his mortgagor transferred the property to him in satisfaction of the mortgage and he conveyed the same to his creditor as further collateral security. Thereafter it was agreed that the wife should convey to such creditor certain of her property as collateral and receive therefor from the creditor the notes and mortgages previously transferred to it by her husband, and a quitclaim deed to the property covered thereby, which was done. The property conveyed by the wife to the creditor was subject to a mortgage which was released by the mortgagee, and the notes and mortgages which the wife received from the creditor were accepted by him in lieu thereof. *Held*, that the wife did not acquire an absolute title by the quitclaim deed from the husband's creditor but that the same amounted to a mortgage only, and that as the conveyance of her land to the creditor was as security only for the debt of her husband she was entitled to hold the quitclaim deed as security against loss by reason of her conveyance to secure the husband's debt, and

## FRAUD Continued

TO

## HIGHWAYS

that the husband's creditors were entitled, subject to her right, to subject his equitable interest in the property to the satisfaction of their claims. *Idem*.

## GUARDIANSHIP.

**Failure to make timely report: Removal: Discretion.** The statute requiring a guardian to make report at least once a year and subjecting him to removal for failure to do so is not mandatory, but the court is invested with discretionary power to inquire into the merits of each case and to remove or refuse to remove the guardian for failure to file his report in time, as the safety of the trust and interests of the ward seem to require. In re Guardianship of Nelson, 118.

**Same: Discretion of court: Excuse of guardian.** In this proceeding for the removal of the guardian of an incompetent because of failure to file his report within the statutory time, the facts and circumstances and excuse of the guardian for such failure are reviewed, and it is held that there was no abuse of discretion in denying the petition for removal. *Idem*.

## HIGHWAYS.

**Private highway: Condemnation: Pleadings.** A grantee of land not accessible to any highway, who alleges that his grantor owned land lying between the tract in question and a highway, and at one time a private way existed to the land sold, but that this right of way was not transferred; that there had been no road to the highway over grantor's intervening land because the same was rough and unsuitable for road purposes; and that no claim to a way of necessity over the same had ever been made, states a case under the statute providing for the condemnation of land for a road, even though he might have bought a way from another, or held an unenforceable contract with a third person for a right of way. *Miller v. Kramer*, 460.

**Same: Location of road: Statute.** The requirement of the statute providing for the condemnation of land for a private way, that the same shall be on the division line or immediately adjacent thereto, should not be construed too narrowly, as the term "adjacent" has a broader meaning than the term "adjoining." And where the land immediately adjacent to the division line is so rough as to be impassable for road purposes, the way may be located so as to separate a small tract from the balance of the land through which it runs, since the petitioner must pay all damages to the entire tract as well as for the land taken. *Idem*.

HOMESTEADS

TO

HUSBAND AND WIFE

**HOMESTEADS.** See **MORTGAGES.**

**Conveyance by insolvent owner: Rights of creditors.** The homestead is not subject to the payment of debts of the owner, and he may dispose of it as he sees fit even though insolvent and done in contemplation of suicide; so that a conveyance of the homestead by the owner to his wife to enable her to secure her distributive share of his estate from other lands of which he might die seised, is not a matter of which his creditors can complain. *Jamison v. Crocker*, 104.

**Same: Delivery of deed.** The execution of a deed by the owner conveying the homestead to his wife, done in contemplation of suicide and delivered to a third person with instructions to deliver the same to his wife, will, upon delivery after his death according to instruction constitute a sufficient delivery of the instrument. *Idem.*

**Homestead rights of widow: Election: Inconsistent defenses.** In this action brought in the interest of the creditors of an insolvent estate, the widow did not originally make any claim to the homestead, but contended that she was not bound to take her distributive share so as to include the dwelling house used as a homestead, but subsequently claimed the homestead under a deed from her husband, of which she had no knowledge at the time of her original pleading.

**Held**, that she was entitled to resist the claim of the creditors by pleading title to the homestead under the deed, and also to insist upon her right to take a distributive share in the estate not including the homestead, under the statute authorizing inconsistent defenses. *Idem.*

**Same: Conveyance of homestead: Validity.** The fact that a deed conveying the homestead also includes other property, a conveyance of which is in fraud of creditors, will not affect the validity of the instrument as a conveyance of the homestead. *Idem.*

**Same: Distributive share of widow: What included: Statutes.** Under the present statutes the share of the widow of an insolvent must be so set off to her that it will include the dwelling house given by law to the homestead. *Idem.*

**HUSBAND AND WIFE.** See **FRAUD.**

**Alienation of affection: Burden of proof: Evidence.** Where the petition in an action for the alienation of affection alleges that defendant by protestations of love and affection did alienate

## HUSBAND AND WIFE Continued

TO

## INSTRUCTIONS

the wife's affection and induce her to leave the plaintiff, and the allegations were denied by defendant, the plaintiff had the burden of showing that defendant's conduct resulted in the alienation of his wife's affection, and that it was in itself wrongful or was done with intent to alienate her affection. In this action the evidence is reviewed and held insufficient to warrant a verdict for plaintiff. *Bailey v. Kennedy*, 715.

**INDICTMENT.** See **CRIMINAL LAW**.

**INSANITY.**

**Commitment and discharge from hospital for insane: Evidence:**

**Instructions.** The discharge as sane of one committed to a hospital for the insane is *prima facie* evidence of his sanity, although not conclusive, and casts the burden upon one attacking his will subsequently made to show that he was insane at the time of the execution of the will; and such commitment and discharge are competent evidence for the consideration of the jury in determining his mental condition when the will was executed. *Mileham v. Montagne*, 476.

**INSTRUCTIONS.** In criminal cases, see **CRIMINAL LAW**. See also **CONTRACTS—FRAUD—NEGLIGENCE—NEW TRIAL—PHYSICIANS—RAILROADS**.

Where the instructions sufficiently guard the rights of a party he can not complain that the same were not more specific, in the absence of a request therefor. *Colby Bros. v. Breweries Co.*, 552.

Where an instruction has the effect simply to put upon plaintiff too great a burden the fact that it is inconsistent in that respect with another correct instruction on the subject was not prejudicial to defendant. *Bayles v. Savery Hotel*, 29.

Where an issue of mental incompetency is so submitted that the jury could not have misunderstood the law applicable thereto, the judgment will not be reversed on account of general statements in the instructions which might, under other circumstances, have been prejudicially erroneous. *Searles v. Life Ins. Co.*, 65.

**Conflicting evidence: Submission of issues.** Under conflicting evidence the question of whether money paid and sought to be recovered back was paid pursuant to a written contract between the parties, or in part performance of a subsequent oral contract, was for the jury. *Frey v. Stangl*, 522.

**Contributory negligence.** The court's instruction regarding the

## INSTRUCTIONS Continued

TO

## INSURANCE

facts to be considered in determining the question of whether plaintiff was free from contributory negligence is held not subject to the objections that it invaded the province of the jury, singled out facts favorable to plaintiff, was misleading, or incorrect as a statement of the law. *Dow v. Des Moines Ry. Co.*, 429.

**Invasion of province of jury.** Where the witnesses for one party, on the question of the comparative value of land immediately before and immediately after the establishment of a drainage ditch, based their evidence upon personal knowledge of the land, and the witnesses for the adverse party having no personal knowledge testified in response to hypothetical questions, an instruction that the jury might consider the personal knowledge of the witnesses or their lack of personal knowledge of the land, and give to the testimony of each class of witnesses the weight it is entitled to, did not direct them to attach greater weight to one class of evidence than the other, and did not invade the province of the jury. *Hickey v. Webster County*, 337.

**Weight: Determination by jury.** In determining the value of land upon conflicting evidence consisting largely of matters of opinion, the jury may adopt a middle ground and fix their verdict accordingly. *Idem*.

**INTERROGATORIES.** See PLEADINGS.

**INTERSTATE COMMERCE.** See CARRIERS.

**INSURANCE.**

**Action upon policy: Abatement: Another action pending.** In this action upon an insurance policy by the administrator the defendant admitted liability but pleaded another action pending in a foreign jurisdiction by an assignee of the policy, and it is held that the administrator was not required to make such assignee a party to his action and that the pendency of the assignee's suit was immaterial to plaintiff's right of recovery. *Searles v. Life Ins. Co.*, 65.

**Same: Assignment of policy: Mental Incapacity.** One whose mind is permanently impaired from an excessive use of intoxicating liquors, so that he is irresponsible and unable to rationally transact business, is not bound by an assignment of his insurance policy made while thus incapacitated, even though at the precise time of the assignment he was not intoxicated, or did not manifest any aberration. *Idem*.

**Same: Evidence.** Evidence that plaintiff's decedent was incapable

**INSURANCE Continued**

of transacting business at and before the assignment of the policy in suit was not incompetent as invading the province of the jury. *Idem.*

**Beneficial insurance: Action upon certificate: Money judgment.** In a suit upon a beneficiary contract of insurance providing that the beneficiary shall receive an amount equal to the proceeds of one assessment, not however exceeding a stated sum, the beneficiary is entitled to a money judgment for such sum unless the association shows that an assessment will not yield that sum. *Wasson v. American Patriots*, 142.

**Same: Deductions from face of certificate: Burden of proof.** Where a beneficial certificate of insurance provides that in the event of death the certificate shall be charged with the amount such member would pay during the expectancy of life as shown by the mortuary tables, and at the same rate of assessment as previously paid, the beneficiary is entitled primarily to the face of the certificate subject to any charges that might be made against it; and it is incumbent upon the association to plead and prove the amount of such charges. *Idem.*

**Same: Change in by-laws: Effect.** The rights of a beneficiary under a certificate of insurance can not be affected by a change in the by-laws made after his rights had accrued. *Idem.*

**Fraternal insurance: Action upon policy: Defenses: Statutes.** Code, section 1812, providing that where the examining physician for an insurance company or association reports upon an applicant that he is a good physical risk, the company is thereby estopped from defending an action on the policy on the ground that the applicant was not in the required condition of health at the time of its issuance, unless such report was procured by the fraud or deceit of the applicant, has no relation to fraternal beneficiary societies, orders or associations.

In the instant case the pleadings and proof show defendant to be a fraternal beneficiary society and therefore exempt from the provisions of the statute. *Sargent v. Modern Brotherhood*, 600.

**Same: False statements: Breach of warranty.** Where an application for membership in a fraternal beneficiary society contains representations which are untrue, the society, under a provision of the certificate that if the application or any part of the same contains untruthful statements the certificate shall be void, may rely on any such false statements as breaches of warranty. *Idem.*

**Same: Burden of proof.** The burden of proof is upon a fraternal

**INSURANCE Continued**

insurance society seeking to show the falsity of the answers of an applicant for membership. *Idem.*

**Evidence: Affirmative and negative testimony.** The testimony of an examining physician that he had no recollection of calling upon the applicant professionally previous to the examination, or that his attention was called to that fact at the time of the examination, was not sufficient, in view of the fact that he had made many other examinations for defendant and other fraternal orders, to overcome the specific testimony of another witness as to what was said to him and by him at the time. *Idem.*

**Misrepresentations: Warranties.** A beneficial society may by its contract make a misrepresentation in an application for membership a warranty in the sense that a false statement will render the contract void, although the inquiry in response to which the statement is made is not as to a matter strictly material to the risk, and the death of the member did not result from any of the matters as to which the false statements were made. *Idem.*

**Same: Interpretation of language used.** In the interpretation of the language used in the questions propounded and the answers thereto of an applicant for fraternal insurance, a reasonable and even liberal construction will be adopted in favor of the member, so as to avoid a forfeiture on technical grounds. *Idem.*

**Same: False statements: Sufficiency of proof.** The statement of an applicant for beneficial insurance that he was in good health is not shown to be false by proof of temporary ailment not of so serious a character as, according to common understanding, would be called a disease. Thus in this case proof that the applicant had temporarily suffered from throat and stomach trouble, and had suffered occasional headaches from temporary causes, was not sufficient to establish as false the representation of applicant that she had not previously been afflicted by disease; although there was a specific inquiry as to habitual headache which was answered in the negative. *Idem.*

**Same.** An applicant for beneficial insurance is not required to disclose the occasion and circumstances of every consultation with a physician for temporary indisposition not amounting to disease; and a statement that the applicant had not been attended by a physician was not shown to be false because of proof that she had consulted a physician for temporary ailments. *Idem.*

**Same: Estoppel.** Where an applicant informed the examining physician of a fraternal society, at the time of taking his applica-



## INSURANCE Continued

tion, concerning the applicant's last attendance by a physician and the nature of his ailment, and was informed that it was not necessary to disclose that matter, he was relieved from any imputation of falsity in failing to disclose the facts. *Idem.*

**Fraternal insurance: Action upon certificate: Remedy.** A certificate of insurance which provides for indemnity in an amount to be realized from a single assessment not exceeding a specified sum is enforceable only in equity, but one stipulating for the payment of a stated sum without reference to an assessment is enforceable at law. *Wood v. American Yeomen, 400.*

**Same: Substituted certificate: Date: Forfeiture.** Where a new beneficial certificate of insurance, issued as a substitute for the original certificate and bearing the date of the original certificate, stipulated that suicide of the insured within three years from the date of the certificate would invalidate the same, the date referred to has reference to the time specified in the original certificate; and the suicide of the member after the lapse of three years from the date of the original certificate did not invalidate the substituted certificate. *Idem.*

**Same: Change in beneficiary.** Where a member of a beneficial insurance society having the absolute right under the by-laws to change the beneficiary does all that is necessary to effect a change, an equitable assignment for the benefit of a new beneficiary is effected, even though the member dies before the issuance of the certificate making the change; and the new beneficiary can enforce the certificate. *Idem.*

**Same: Issuance of new certificate.** Where a member of a beneficial insurance society surrenders his certificate for the sole purpose of making a change in the beneficiary, the society can not change the conditions of the contract without the assent of the member; and where the certificate is surrendered solely for that purpose with a request that the insurance be continued in favor of the new beneficiary under a new certificate, in other respects identical with that surrendered, a delivery of the new certificate is not essential to the validity of the contract. But if the new certificate, instead of being responsive to the application for the change, contains new or different conditions from those of the original certificate, it will not be effective until the assured has indicated his acceptance of the new conditions. *Idem.*

**Change in application: Waiver of conditions.** An insured has the right to assume that the company will not change his application for insurance or issue a policy not in accordance therewith.

## INSURANCE Continued

TO

## INTOXICATING LIQUORS

So that where the company altered the application after it had been signed by the insured and without his knowledge, and without calling his attention to the change, and the policy was delivered with the statement of the company that it was written in compliance with the application, such assurance was a waiver of any agreement that the insured would notify the company if the policy was not right. *Rake & Son v. Insurance Co.*, 170.

**Accident insurance: Cause of death: Sufficiency of notice.** Proof of death under an accident policy indemnifying against death by external, violent and accidental means, which showed that death resulted from poison introduced into the system by an embalming needle, sufficiently established the cause of death, and that it was by external, violent and accidental means. *Simpkins v. Hawkeye Assn.*, 543.

**Same: Evidence.** Strictly speaking there can be no accident causing death, within the terms of a contract of accident insurance requiring written notice of the accident causing death within a specified time after the accident, so long as the insured lives; and that requirement is satisfied by notice in the proofs of death furnished shortly after it occurred. But in the instant case a notice of the accident was given within the required time, and although the facts did not show a waiver of notice, they were sufficient to warrant an inference of the fact of notice. *Idem.*

**Accidental injury and death: Evidence.** It is also held that the evidence is sufficient to show an accidental injury and the accidental nature of the death of the insured. *Idem.*

**Same: Exemption from liability: Contact with poisonous substances.** Where, as in this case, an embalmer accidentally injured his hand with the point of an embalming needle, which was followed by blood poison resulting in death, the death was not from contact with poisonous substances within the terms of the policy exempting the insurer from liability in such cases. *Idem.*

**Construction of contract.** Where any of the provisions of a contract of insurance are open to different constructions the one most favorable to the insured will be adopted by the court. *Idem.*

## INTOXICATING LIQUORS.

**Canvass of statement of consent: Record of findings: Sufficiency.** A board of supervisors in canvassing a statement of consent to the sale of intoxicating liquors, and in making its

**INTOXICATING LIQUORS Continued**

record of such canvass, is not required to detail in the record all of the facts upon which its findings are based; but a finding and the record thereof showing that the statement of consent contained the signatures of more than sixty-five percent of the legal voters of the county, outside of a city, who voted at the last general election as shown by the poll list, and also that the statement contained the genuine signatures of a majority of the voters in each town or township of the county, except a certain town and township, was sufficient. *Sawyer v. Steinman*, 610.

**Same: Canvass of successive statements within one year.** The provision of the statute that only one statement of consent to the sale of intoxicating liquors shall be canvassed, "in any one year," means a calendar year, and not an interim of twelve months between the presentation and canvass of successive petitions. *Idem*.

**Resolution of council: Sufficiency.** One of the essential requisites to the right to sell intoxicating liquor under the mulct law is that the town council shall by formal action adopt a resolution authorizing the same and that a record of such action shall be preserved. And where this has not been done a properly certified copy of the resolution can not be made and filed with the auditor as contemplated by the statute. In this action it is held that the purported resolution of the council and the record thereof were insufficient. *Sawyer v. Collins*, 712.

**Payment of mulct tax: Effect.** Compliance with the mulct law will not authorize the sale of intoxicating liquors outside of a city or town. *Beck v. Woodruff*, 193.

**Same: Constitutional law: Special privileges.** The law prohibiting the sale of intoxicating liquors outside of cities and towns is not unconstitutional as giving the inhabitants of cities and towns special privileges. *Idem*.

**Contempt: Evidence of illegal sale.** In this contempt proceeding for violating an order restraining the illegal sale of liquor the evidence is held to show, without substantial conflict, that sales were made to minors in violation of the order. *Sawyer v. Hutchinson*, Judge, 449.

**Same: Contempt: Filing of evidence: Dismissal of proceeding.** Although the court can not commit one for contempt until the evidence has been made of record as provided in Code, section 4466, still it should not dismiss the proceeding for the reason that the evidence was not then of record but should postpone action until the proper record was made. *Idem*.

## INTOXICATING LIQUORS Continued TO JUDGMENTS

**Contempt: Continuance of business: Qualification.** Where a saloon keeper by violating an injunction against illegal sale has forfeited the protection of the mulct law, he can not avoid a second charge of contempt on the theory that he has made a change in the method of conducting the business, but he must qualify anew to entitle him to the benefits of the law. *Sawyer v. Gaynor*, Judge, 115.

**Same: Subsequent sales: Adjudication.** A discharge from contempt proceedings for the violation of an injunction against the illegal sale of liquor is not an adjudication of subsequent charges based upon sales made after the discharge. *Idem*.

**Dismissal of action: Notice to county attorney.** Failure to notify the county attorney of a motion to dismiss an action brought by a citizen to restrain the illegal sale of liquor will not render an order of dismissal invalid, in the sense that it may be collaterally attacked in a wholly independent action; as the requirement of such notice is not jurisdictional the act of the court in dismissing the action without notice is erroneous merely. So that an erroneous dismissal of an action thus made can not be urged as a ground of the invalidity of a renewal of consent to the sale of intoxicating liquors given the assignee of a defendant, against whom such action was dismissed. *Sawyer v. Kelly*, 644.

**Same: Dismissal of action: Fraud: Consent to the sale of liquor: Validity.** In this action to enjoin the sale of intoxicating liquors the evidence is held insufficient to establish fraud or collusion by the transferee of a liquor dealer, who received a renewal of consent from the city council, in procuring the dismissal of a suit, so as to render the dismissal invalid, thereby invalidating the consent granted him by the city council. *Idem*.

**JUDGMENTS.** See CONTRACTS—CONTEMPT—PLEADINGS.

**Affirmance of judgment by operation of law.** Upon the equal division of the appellate court a judgment of the lower court is affirmed by operation of law. *State v. Board of Directors*, 487.

**Conclusiveness.** A judgment in an action against a defendant therein is not evidence of the truth of the allegations of the petition, which can be relied upon in another action by a stranger to the judgment. *Sawyer v. Kelly*, 644.

**Presumption of regularity: Want of notice: Evidence.** A judgment entered without notice or consent of defendant is void and may be directly or collaterally attacked whenever any right based

## JUDGMENTS Continued

thereon is asserted; but when entered by a court of general jurisdiction a presumption exists in favor of notice or acquiescence therein which can not be overcome except by clear and satisfactory evidence, and mere failure of the record to show service of notice or return thereof, or appearance and consent to judgment will not overcome the presumption in favor of its regularity. This rule, however, does not obtain in cases dependent upon notice by publication or other form of constructive service, or in proceedings where the court exercises purely statutory powers. *Hawk v. Day*, 47.

**Transcript: Lien.** The filing of a transcript of a judgment in another county thirty years after its rendition did not create a lien upon property therein. *Mudge v. Livermore*, 472.

**Same: Enforcement.** A judgment creditor is not entitled to the aid of equity in the enforcement of a judgment which is not a lien. *Idem*.

**Same: Liens: Enforcement.** Although a judgment does not operate as a lien in the county where a transcript is filed, a lien may be obtained by the issuance and levy of an execution, and can be perfected by sale of the property. *Idem*.

**Same: Enforcement in equity.** Where a judgment defendant's interest in property out of which the judgment is sought to be enforced is undisputed, the judgment creditor has a complete and adequate remedy at law and he can not therefore invoke the aid of a court of equity. *Idem*.

**Same: Revivor: Personal service.** A dormant judgment can not be reestablished except by an order of revivor or a new judgment; and a revivor of the judgment by an action thereon can only be had upon personal service. *Idem*.

**Vacation of same for fraud.** A judgment procured by fraud preventing the defeated party from pleading and proving the facts, thereby resulting in injustice, may be set aside on a timely application. *Griffith v. Life Association*, 727.

**Same.** Where a party by statements concerning a transaction with a deceased person, shown by the books of such party to be false, has misled another into a reliance upon such statements in prosecuting an action, and thereby procured a judgment releasing himself from an obligation which otherwise might have been enforced, the party is guilty of fraud and the judgment may be set aside on that ground. *Idem*.

JUDICIAL NOTICE TO LIMITATION OF ACTIONS  
JUDICIAL NOTICE. See COURTS.

## JURIES.

**Grand jury: Selection.** The court may, during the term, reconvene the same grand jury, or it may recall the whole panel and order the drawing of a new jury, and a valid indictment can be found by either. And even if there was a technical irregularity in drawing the jury it would not affect the validity of an indictment found by it, unless it could be reasonably inferred that the defendant was prejudiced thereby. *State v. Heft*, 617.

**JURISDICTION.** See REAL PROPERTY—WILLS.

## LANDLORD AND TENANT.

**Fraud: Evidence.** A tenant who has paid as rent a specified price per acre for a stated number of acres of land, as fixed by the terms of his lease, can not recover back any portion of the rent so paid on the ground that there was in fact a less number of acres, without showing that the lessor at the time of the execution of the lease fraudulently represented the quantity of land, that he relied thereon and that the representations were with intent to defraud him. *Parkinson v. Kortum*, 217.

**LIENS.** See JUDGMENTS.

## LIMITATION OF ACTIONS.

**Attachment: Enforcement of lien.** An action upon a foreign judgment against a nonresident aided by attachment, is, so far as the attachment is concerned, a proceeding *in rem* or *quasi in rem*; and the property of defendant levied upon under the attachment before the running of the statute of limitations may be subjected to the payment of the debt, even though a personal judgment can not be rendered against the defendant because the action for that purpose was not commenced in time. *Slater v. Roche*, 413.

**Same: Commencement of action: Personal judgment.** An action against a nonresident is not commenced within the meaning of the statute of limitations by the filing of the petition or the affidavit for publication of notice, but upon completed publication of the notice; and where the publication is not complete until after the running of the statute a personal judgment can not be rendered even though the defendant personally appears after the claim is barred. *Idem*.

## LIMITATION OF ACTIONS Continued TO MASTER AND SERVANT

**Commencement of action: Attachment.** An action to subject property of a nonresident to the payment of a foreign judgment is commenced, within the meaning of the statute of limitations, when the property is levied upon under a writ of attachment, and the statute then ceases to run. *Idem.*

**MARRIAGE AND DIVORCE.**

**Divorce: Custody of children: Modification of decree.** The court has power to modify a former decree of divorce with respect to the custody of minor children where there has been such a change in the circumstances and conditions of the parties as will authorize the same; and in this matter the trial court is vested with a wide discretion. In the instant case the changed circumstances and conditions of the parties are held to justify a modification of the former decree with respect to the custody of the child. *Linguist v. Linguist*, 259.

**Relationship by affinity: Termination.** Relationship by affinity terminates by the termination of the marriage which gave rise to the relationship, when it occurs either by death or divorce. So that the marriage of a man to the daughter of his divorced wife by a former marriage is not invalid, because within the prohibited degrees of affinity as defined by Code, section 4936. *Back v. Back*, 223.

**MASTER AND SERVANT. See NEGLIGENCE.**

**Assault by one servant upon another: Liability of master: Evidence.** The master is not liable for the assault made by one servant upon another where the same was not done in the prosecution of the master's business, but in order to effect some purpose of the party making the assault. In the instant case the evidence is held insufficient to show that the assault was committed in the prosecution of the master's business. *Everingham v. Railway*, 662.

**Same: Ratification of servant's act.** Mere retention in his employ by the master of a servant who has committed an assault upon a fellow servant as the result of his own malice does not amount to a ratification of his act and render the master liable therefor. *Idem.*

**Same: Evidence of reputation.** Where a servant of his own volition and to gratify his personal malice makes an assault upon a fellow servant, evidence of his reputation for quarrelsomeness is immaterial, in an action against the master for the assault. And

MASTER AND SERVANT Continued TO MINES AND MINING

the evidence sought to be offered in this action was objectionable because not confined to the servant's reputation in the community in which he lived. *Idem.*

**Same: Conduct of servant: Liability of master.** The master can only be held responsible for the fidelity and good conduct of a servant while acting within the scope of his employment; he can not be held to warrant the servant's conduct in matters outside of the employment. *Idem.*

MISCONDUCT IN ARGUMENT. See NEW TRIAL.

MINES AND MINING.

**Contract of sale: Recovery of purchase price: Tender.** In this action plaintiff contracted to sell defendants and others certain mining properties which he agreed to convey to a named corporation, and in consideration the second parties agreed to pay one-half of the capital stock of the corporation, partly in cash and the balance within a specified time, which each of the second parties bound themselves to pay in proportion to the stock subscribed for by them. The contract also fixed the capital stock of the corporation and provided that a portion of the same should be treasury stock and should be contributed to by the parties equally, the remaining stock to be deposited in a bank, and any portion of the shares belonging to the second parties were to be delivered to the directors of the corporation upon payment of a certain price per share, which should be applied on the amount due plaintiff so far as necessary to discharge their obligation to him. The agreement also provided that if any of the second parties failed to discharge their obligation due plaintiff the directors of the corporation should sell enough of their shares to make up the deficit. *Held*, that as the provision for issuance and distribution of the stock, in addition to procuring funds to operate the mines by the sale of treasury stock, was to secure the deferred payments owing plaintiff, the second parties were not entitled to their share of the stock deposited in the bank until their respective portion of the debt due plaintiff was paid; and that in this action against one of the second parties to recover his share of the deferred payments a tender of the stock was not necessary to enable plaintiff to recover. *Thornburg v. Doolittle*, 530.

**Same: Consideration.** The consideration for the obligation due plaintiff in this action was the conveyance of the property to the corporation, and not the issuance of the stock as provided in the contract. *Idem.*



MINES AND MINING Continued

TO

MORTGAGES

**Same: Performance of contract: Evidence.** Where, as in this case, deeds and abstracts of title were received and retained by the corporation without objection, an agreement of the shareholders to negotiate an exchange of the property so purchased for other property was competent evidence on the question of plaintiff's performance. *Idem.*

## MORTGAGES.

**Assignment: Bona fide purchaser.** The recording statutes have no application to the transfer of instruments which are transferable by indorsement and delivery, so far as a subsequent purchaser is concerned. Thus, where the assignee of a note and mortgage procured the assignment from the mortgagee after he had indorsed the note in blank and delivered it with the mortgage to a third person, and while the latter was to his knowledge in possession thereof, he was not an innocent purchaser although the former assignment was not recorded. *Bunker v. Harvester Co.*, 708.

**Same.** Where the assignee of a note and mortgage acquired the same, as in this case, subsequent to an indorsement of the note in blank and a delivery of it and the mortgage to a third person, under an agreement to find a purchaser of the note and to apply the proceeds to the payment of claims against the mortgagee and to account to him for the balance, an equitable interest only was thereby acquired, which could not be asserted against the rights of the original transferee; and where the original transferee in conjunction with the mortgagee induced the mortgagor to take up the note prior to maturity and used the proceeds accordingly, the subsequent assignee had no claims against him therefor, although he obtained less than the face of the note. *Idem.*

**Foreclosure: Sale of homestead.** Where a mortgage covers both a homestead and other property of the mortgagor, the mortgagee may be required to exhaust the other property before resorting to the homestead. But if the other property has been subjected to prior liens and is not available to the mortgagee it has been exhausted, within the meaning of the statute and so far as the mortgagee is concerned, and he may then resort to the homestead. *Huttig Mfg. Co. v. Burhans*, 657.

**Same: Representations of mortgagee.** The statement of a mortgagee that the homestead, if included in the mortgage, would not be resorted to until the other property covered thereby had been exhausted, although made to induce the mortgagor to include the

**MORTGAGES Continued**

same in the mortgage was no more than a statement of what the law requires; but if the same could be construed as a promise on the part of the mortgagee it was complied with by a finding that the mortgage, so far as it covered other property, was fraudulent and void as to the mortgagor's creditors. *Idem*.

**Foreclosure: Purchase of tax title by mortgagor: Validity of such title.** In this suit to foreclose a mortgage the holder of a tax title was made defendant and claimed title to the mortgaged property under a tax deed, asked that his title be quieted against plaintiff and also against the mortgagors, who denied the validity of the mortgage. The judgment of foreclosure and sale was reversed on appeal and pending the appeal the property was sold for taxes, the plaintiff acquiring a tax title. *Held*, that it was plaintiff's duty to pay the taxes on the property during the time the judgment of foreclosure remained unreversed, and that it could not acquire a tax title through a sale or by purchase of a tax sale certificate while insisting upon title under the foreclosure; that such transacted amounted to a payment of the taxes or a redemption from the tax sale and could not be made the basis of an independent title against the defendants, under the rule that one in possession of real property or whose duty it is to pay the taxes can not acquire a tax title which will defeat a conflicting claimant or lienholder. *National Surety Co. v. Walker*, 157.

**Same: Restitution of property: Accounting.** It is also held that as the original tax title holder, who was made a defendant and answered claiming title under the tax deed and by cross-petition asked that his title be quieted against plaintiff and against his co-defendants, the mortgagors, was entitled to a restitution of the property, or in case this could not be done to a judgment for its value; and that plaintiff is entitled to reimbursement for the amount paid by it for the tax certificate, not exceeding the amount it would have been obliged to pay to redeem, and also to credit for taxes paid and the amount expended for repairs or improvement of the property including insurance, and is chargeable with the rents and profits. *Idem*.

**Homestead: Foreclosure and sale.** Where the homestead and other property is included in the same mortgage, the mortgagor on foreclosure may insist on a sale of the other property before resort is had to the homestead. *Bankers Life Assn. v. Engelson*, 594.

**Same: Sale of homestead.** Where a senior mortgage includes a homestead and other property, and a junior mortgage covers the other property only, the junior mortgagee can not compel the

## MORTGAGES Continued

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senior mortgagee to resort first to a sale of the homestead for the satisfaction of his mortgage; so that a decree foreclosing the mortgages which directed that the homestead should not be sold except for a deficiency remaining after subjecting the other property to the payment of the senior mortgage was proper. *Idem.*

**Same.** Under such circumstances the junior mortgagee, as between himself and the mortgagor, is a mere creditor as to the homestead, and the mortgagor can convey the homestead free from any claim under the junior mortgage, and the purchaser will hold it free from liability, except such as it was subject to in the hands of the mortgagor. *Idem.*

**Same: Homestead: Liabilities of purchaser.** A decree foreclosing both mortgages under such circumstances and providing for the apportionment of the proceeds between the mortgagees, which directs that the homestead shall not be sold except for a deficiency remaining upon the senior mortgage after a sale of the property other than the homestead, fixes the liability of the several tracts, and a subsequent purchaser of the homestead may rely upon such decree as fixing the obligation which he assumed in purchasing the homestead subject to the mortgages. *Idem.*

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**Appointment of officers: Soldiers preference law.** The statute requiring the council in cities of the first class to appoint a street commissioner at the first meeting after the biennial election fixes the term of such officer for two years, with express power of appointment at the expiration of that time; and a veteran appointed to the office can not invoke the soldiers preference law as against another qualified veteran appointed at the close of the two year term. *King v. City of Ottumwa*, 411.

**Ordinances: Single subject.** An ordinance regulating the speed of trains within the limits of a municipality, prohibiting the obstruction of streets and sidewalks by trains, making it unlawful for those not employed thereon to get on or off trains while in motion, and making such acts criminal and providing punishment therefor, is not objectionable as containing more than one subject. *Trout v. Railway Co.*, 135.

**County bridges: Personal injury: Proximate cause.** In this action for injury to plaintiff, who, while attempting to rescue his horse which had caught its foot in a hole in a county bridge, was thrown over the banister of the bridge and injured, it is held that

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his injury thus received was the proximate result of the defective bridge. *Williams v. Clarke County*, 746.

**Same: Extent of injury: When a question of fact.** Where experts disagree as to the nature of plaintiff's suffering and the character of his injuries the question of extent of the injuries becomes one for the jury. *Idem*.

**Sidewalk accident: Negligence: Evidence.** In an action for injuries received from an alleged defective sidewalk the question of the city's negligence, under conflicting evidence as to the condition of the walk, is for the jury. *Platts v. City of Ottumwa*, 636.

**Same: Repair of walks: Duty of city: Rights of pedestrians.** A city is held to a higher degree of diligence and knowledge concerning the condition of its sidewalks than an ordinary pedestrian; and although a pedestrian is required to exercise reasonable care for his own safety he may assume that the city has performed its duty, and he need not be constantly on the lookout for defects, the existence of which have not come to his notice. *Idem*.

**Streets: Dedication.** In this action to enjoin the defendant town from appropriating as a part of the street a strip of land claimed to belong to plaintiff, the evidence is held to show that the street as dedicated was one hundred feet wide and not eighty feet in width as extended and fronting on plaintiff's property. *Menohar v. Town of Gravity*, 695.

**Streets: Nuisance: Evidence.** The plaintiff in this action is seeking to recover damages for injury to a horse hitched in defendant's street at a hitching post, around which wood ashes had been deposited resulting in the formation of lye which caused the injury to the horse. It is defendant's contention that the hitching post was not in the street but outside of the street line, and that the nuisance complained of was beyond its limits, although there was nothing visible to indicate the line of the street. *Held*, that the evidence was sufficient to support a finding that the hitching post was upon a strip of land used as a part of the street and was appurtenant thereto, and that the question of the location of the hitching post was properly submitted to the jury. *Worrell v. City of Bloomfield*, 691.

**Change in street grade: Damages: Instructions.** The benefits resulting to abutting property from a change of the street grade are to be considered in connection with the disadvantages result-

MUNICIPAL CORPORATIONS Continued TO NEGLIGENCE

ing from the change in determining the damages to the property. *Meardon v. Iowa City*, 12.

**Same.** An instruction to the effect that abutting property is improved according to an established grade when it is so improved that it can be comfortably used for the purpose to which it is devoted, while the street is maintained at that grade, and that where improvements are made subsequent to the establishment of a permanent street grade, to authorize recovery of damages for a change in the grade the improvement must have been made according to the established grade, was correct. *Idem.*

**Change in grade: Damages: Instruction.** A change of street grade is an actual physical change in the surface of the street, and where an established grade is changed after property has been improved with respect thereto without injuring the value of the property the city is not liable for such change; and where a city commences the work of changing the grade, but ceases operations for such length of time as to make it appear that the work is completed, the owner of abutting property can only recover for such injury as was occasioned by the work that had been done. *Idem.*

**NEGLIGENCE.** See PHYSICIANS—RAILROADS—TELEGRAPHS AND TELEPHONES.

**Presumption.** No presumption of negligence arises from the mere fact that one is injured, but it may arise from the nature of the cause or manner of the injury. *Cahill v. Ill. Cent. Ry.*, 241.

**Submission of issue.** It is reversible error to submit issues of negligence which have no support in the evidence. *Yeager v. Railway Co.*, 231.

**Master and servant: Injury to servant: Defective machinery:**

**Evidence.** In this action for injury to plaintiff while assisting in unloading steel plates from a car by the use of a clamp machine by which the sheets were raised and lowered from the car, the evidence is held insufficient to show that the clamp was defective, causing it to lose its hold upon one of the plates which fell and injured plaintiff. *Ashcraft v. Locomotive Works*, 420.

**Same: Burden of proof: *Res ipsa loquitur*.** A servant claiming that his injury was the result of defective machinery furnished by the master not only has the burden of showing the claimed defect herein for which the master was responsible, but must also show that this defect was the proximate cause of his injury;

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so that where there are several causes which may have operated to produce the injury, for one of which, only, the master was responsible, the doctrine of *res ipsa loquitur* does not apply, and if nothing more than the happening of the accident is shown in such a case the servant has failed to establish his cause of action. *Idem.*

**Same: Negligence of coemployees: Instructions.** Where as in this case, the uncontradicted evidence showed that defendant furnished clamps of different sizes for lifting plates of different sizes, and that when plates were thin so that the clamp was liable not to hold the same wedges were provided to be placed between the plates and the clamp jaws, instructions that if defendant did not use ordinary care in supplying and using the clamp in question it was liable, were erroneous, because making the defendant responsible for the manner in which the clamp was used by coemployees. *Idem.*

**Same: Negligence: Duty to warn: Evidence.** Where there was evidence that plates of steel had slipped from the clamp and fallen while being so handled, of which defendant had knowledge and concerning which the plaintiff, an inexperienced workman, was not advised, it was the duty of the defendant to warn plaintiff of the possible danger; and under the evidence in this case the negligence of defendant in this respect was for the jury. *Idem.*

**Same: Fellow servant: Vice-principal.** Defendant's foreman, who was superintending the unloading of the plates in question by plaintiff and others, was plaintiff's fellow servant in the matter of performing the work and selecting the tools used, but he was a vice-principal for the purpose of warning plaintiff of dangers incident to the work. *Idem.*

**Instructions.** It is the duty of the court in submitting questions of negligence to confine the jury to a consideration of the grounds of negligence charged, rather than permit them to find for plaintiff if any negligence on the part of defendant was shown. *Idem.*

**Knowledge of danger: Duty to warn: Evidence.** Although the clamp used in the instant case for unloading the sheets of steel was a proper device to use for that purpose, still, if sheets of steel were liable to fall endangering the workman, of which plaintiff was not aware, it was the duty of defendant to warn him of such danger; and evidence that plates had previously fallen while being handled with clamps of the type used at the time in

## NEGLIGENCE Continued

question was admissible, on the question of defendant's knowledge of the danger and its duty to warn plaintiff. *Idem*.

**Master and servant: Uncovered machinery: Statute: Negligence: Evidence.** The statute requiring factory machinery to be properly covered is intended as a protection against the carelessness and ignorance of those who may incidentally come in contact therewith, and for the benefit of operatives, who by reason of inadvertence or misfortune, might be injured thereby. The operation of a planing machine which is not properly covered as provided by the statute is negligence on the part of the employer, and in that sense must be regarded as dangerous; and it is immaterial that similar planers were in use in other factories or that the one in question was of standard make. *Kirchoff v. Creamery Supply Co.*, 508.

**Same: Submission of issues.** Where the proof is such that an issue of fact is raised concerning the proper protection provided for machinery, the jury should be informed of the provisions of the statute and instructed as to what would constitute a proper cover; and if it conclusively appears that the machinery was not properly covered the jury should be so told, and also that in permitting its operation in that condition the master was negligent. In this action for injury to plaintiff while operating a planer the evidence is held to show that the machine was not properly covered, within the meaning of the statute, and that the court erred in submitting the question of whether it was a dangerous machine. *Idem*.

**Same: Assumption of risk: Instructions.** Ordinarily where one of mature years knows of the dangers incident to the operation of machinery it will be assumed that he appreciated the risk. And the knowledge exacted is that of the condition or defect in the machine and the appreciation relates to the danger arising from its operation in that condition; and where the instruction of the court as given as clearly exacted proof of appreciation of the dangers as an element of assumption of risk as that requested, the requested instruction was properly refused. *Idem*.

**Same: Duty to warn: Evidence of custom.** The necessity of warning employees of the dangers incident to the use of machinery arises out of the nature of the machinery, the dangers involved in its use, and the experience and intelligence of the employees; so that proof of the custom of others to warn and instruct employees regarding the dangers arising from the operation of similar machinery is immaterial. *Idem*.

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**Evidence: Like accidents.** Evidence that no other like accident had ever occurred in the operation of the machine in question was inadmissible on the question of negligence. *Idem.*

**Same: Assumption of risk: Contributory negligence: Evidence.** Under the evidence in this case the questions of whether plaintiff assumed the risk or was himself negligent in the operation of the planer were for the jury. *Idem.*

**Master and servant: Injury to servant: Evidence.** Where it appeared that an injury to an employee might as well have happened from some cause for which the master was not responsible as from a cause for which he was liable, a question of negligence on the master's part was not made out; as where an employee was injured by the sudden starting of a freight elevator from which he was unloading goods, and the evidence failed to disclose the cause of its starting, but could be attributed to the act of plaintiff as properly as to the act of the coemployee. The evidence is held insufficient to support a finding that defendant's general manager in charge of the business started the elevator without giving the required warning. *Helgeson v. Higley Co.*, 587.

**Same: Warning: Negligence of fellow servant.** Where the master has promulgated the necessary rules about giving employees warning and has instructed all employees to do so, this duty rests upon all of the employees alike; and a failure of one employee engaged in the same common service to perform this duty, which is the only negligence charged, is not chargeable to the master, even though he was of a higher grade than the fellow servant who was injured. *Idem.*

**Assumption of risk: Submission of issue.** Where the issue of assumption of risk is tendered by the pleadings and there is evidence to support it the question should be submitted to the jury; but in the instant case failure to submit the issue was not of itself reversible error. *Idem.*

**Master and servant: Injury to servant: Scope of employment: Evidence.** In this action for injury to a servant while performing a service at the direction of his superior, the question of whether he was acting outside the scope of his duty and as a mere volunteer was, under the evidence, for the jury. *Bayles v. Savery Hotel Co.*, 29.

**Same: Contributory negligence: Evidence.** The plaintiff in this action was directed to perform a duty in an unlighted part of defendant's premises with which he was not familiar, and while



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doing so fell into an unguarded drain of which he had not been warned and which was not readily discoverable. *Held*, that he was not negligent as a matter of law. *Idem*.

**Same: Vice-principal: Instructions.** Authority to hire and discharge men is not of itself a criterion of vice-principalship but is a proper circumstance bearing upon that question. But in this action the real controversy was whether plaintiff was acting within the scope of his employment, and if so he was entitled to a safe place to work and to a warning of hidden and unknown danger; so that an instruction on the question of whether his superior was a vice-principal, to the effect that plaintiff must prove not only authority of his superior to hire and discharge men but also to direct what plaintiff should do and where and how he should work, was erroneous, only in the sense that it imposed on plaintiff an undue burden; and was not therefore prejudicial to defendant, it being sufficient to show that his superior had authority to direct plaintiff in his work. *Idem*.

**Master and servant: Injury to servant: Warning.** Where a workman is subject to distinct perils a warning as to one peril may not, as a matter of law, be sufficient warning as to the other. As in this case where plaintiff, operating a rip saw, was warned of a liability that the timber he was sawing might kick back such warning was not sufficient to cover peril arising from its being thrown forward, thus bringing his hand in contact with the saw. *Obenchain v. Harris & Cole*, 86.

**Same: Assumption of risk: Pleading.** In this action the defendant denied the allegations of the petition and pleaded the assumption of the risks by plaintiff in his employment, one of which was the doing of acts alleged in the petition; and it is held that such allegations of assumption of risk added nothing to defendant's preceding general denial, and did not allege plaintiff's assumption of risk created or enhanced by defendant's failure to exercise reasonable care. *Idem*.

**Same: Failure to provide safety appliances: Negligence.** Where it appeared that the saw which plaintiff was operating was not equipped with a divider in common use, which would have prevented the accident, the failure to provide the same was a violation of the statute requiring dangerous machinery to be equipped with safety appliances, and was negligence *per se*. *Idem*.

**Same: Safety appliances: Evidence.** Under the evidence in this case the question of whether a certain safety appliance could have

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been applied to the machinery with which plaintiff was working was for the jury. *Idem.*

**Same: Contributory negligence: Evidence.** Under the evidence as to the manner in which plaintiff operated the saw with which he was at work the question of his negligent operation of the same was for the jury. *Idem.*

**Master and servant: Duty to warn: Use of term "warning."**

Ordinarily the duty of the master to warn a servant of danger relates to those dangers which are not obvious and are not known to the servant and which are or ought to be known to the master, although the term "warning" is often used to designate signals which are used by experienced workmen for mutual convenience and as a part of the method of cooperation. *Galloway v. Turner Improv. Co.*, 93.

**Same: Safe place to work.** The master's liability for failure to furnish a reasonably safe place to work has reference to those dangers inhering in the place, as distinguished from those arising out of the negligence of a fellow servant. *Idem.*

**Same: Safe place to work: Duty to warn: Evidence.** In this action for injury to a servant while employed about a machine used in digging a sewer, it is held that the defendant did not owe plaintiff, an experienced workman, the duty of warning him that the engineer in charge of the machine might negligently start the same without giving a signal; as the possibility of his thus starting the machine was as evident to the plaintiff as to the defendant. *Idem.*

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**Argument of counsel.** Where a witness for a defendant accused of seduction testified that she had been the wife of three successive husbands, one of whom she married twice and from whom she was twice divorced, and another of whom she married while still the lawful wife of a previous husband, there was no impropriety in counsel commenting, within proper limits, on the marital relations and character of the witness. *State v. Criswell*, 254.

**Same.** In view of the evidence relating to the identity of defendant, and the evident purpose of counsel in referring to the same to impress upon the minds of the jury the fact that from the situation of the complaining witness she would be likely to be able to identify the defendant, the argument of counsel is held to have been without prejudice. *State v. Baker*, 149.

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**Same.** The objectionable language used in this case by the prosecuting attorney in his closing argument, which was withdrawn and the jury advised that it was improper, is held to have been without prejudice. *State v. Krumm*, 631.

**Misconduct of jurors: Prejudice.** It is also held that the remark of a juror made to his fellow jurors while deliberating, that he never heard the moral character of the prosecutrix questioned prior to the trial, was not sufficient to set aside the verdict; as the record conclusively shows that no prejudice resulted. *Idem*.

**Remarks of court: Prejudice.** Where the question of the genuineness of a signature was immaterial the remarks of the court in excluding evidence upon that subject are held to have been nonprejudicial. *Griswold v. Dugane*, 504.

**Motion to strike: Harmless ruling.** Any error in striking from the record a motion for a new trial is not prejudicial, where the party by appeal may raise every ground urged in support of the motion for a new trial. *Idem*.

**Reading of instructions: Misconduct.** The act of the trial court in reading his instructions which were favorable to the defeated party in a lower tone of voice was not prejudicial error. And where, as in this case, the affidavit in support of the alleged error was contradicted the appellate court will indulge the presumption existing in favor of the ruling of the trial court. *Hickey v. Webster County*, 337.

**NUISANCE.** See MUNICIPAL CORPORATIONS.

**OFFICERS.** See MUNICIPAL CORPORATIONS.

**Removal of officers: Wilful misconduct: Good faith of officer: Evidence: Submission of issue.** The term wilful misconduct in office, as used in the statute providing that any county officer may be removed for wilful misconduct or maladministration in office, is not applicable to every case of misconduct, nor to every mistake or departure from the strict letter of the law; but only to wilful wrongs, or omissions on the part of such officer. So that the question of the good faith and innocence of intentional wrong becomes important, and evidence upon that question is admissible.

In this action it appeared that defendant, a county treasurer, received payment of taxes after the close of the semiannual tax-paying period, without exacting the penalty for delayed payment,

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in accordance with the long established custom and believing the practice to be legal. There was no corrupt agreement of any kind between him and the taxpayers and he received no profit from the transaction. *Held*, that the wilfulness of defendant's act, if wrongful, was a question for the jury, and a judgment of ouster should not have been entered by the court without a submission of the issue. *State v. Meek*, 671.

**Same.** While the statutes seem to contemplate that every taxpayer shall appear in person at the office of the treasurer and pay his taxes, still a treasurer is not to be condemned for wilful misconduct in accepting payment of taxes, as if made to him in person, when transmitted by check or collected and paid through local banks, even though there may be a delay of a few days in completing the actual transmission of the money. *Idem*.

## PAYMENT.

**Over-payment: Recovery: Evidence.** In this action to recover claimed over-payments for beer, on the ground that the barrels and kegs in which it was shipped contained a less quantity than represented, the evidence is reviewed and held to present a question for the jury. *Colby Bros. v. Breweries Co.*, 552.

## PARTIES.

**When necessary in equitable action.** The rule requiring all parties whose interests are involved in the litigation to be brought in applies in equitable actions only where the plaintiff is seeking relief to which he is not entitled, unless the decree can be made binding upon all those necessarily affected thereby. *Searles v. Life Ins. Co.*, 65.

**Nonjoinder: Remedy.** The remedy for failure to bring in necessary parties is not by a pleading in abatement of the action, but by motion asking the court to order such parties to be brought in. *Idem*.

**Same.** Even if a plea in abatement for defect of parties were proper it would be necessary to show that the parties not joined were subject to process. *Idem*.

**Same.** That a defendant may be subjected to a suit on an inconsistent claim in another jurisdiction is not a defense to an action in a jurisdiction in which he is properly sued. *Idem*.

**Failure to bring in necessary parties: Excuse.** The rule that  
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all persons having an interest in the suit should be made parties is not inflexible. Thus even in equity cases impossibility of bringing in necessary parties is an excuse for not doing so. *Idem*.

## PARTITION.

**Taxation of attorney's fees.** Where the title to property involved in a partition action is put in issue and each of the parties have employed counsel of their own choosing, attorney's fees are not taxable as a part of the costs in favor of plaintiff's attorney. *Hawk v. Day*, 47.

**Same: Substitution of actions.** Where a pending suit in partition involves the entire subject matter and all persons entitled to a share in the property have been made parties, so that a decree entered therein will effectually settle and adjudicate the shares and interests of all concerned, it should not be displaced in a subsequent action brought to accomplish the same purpose. *Idem*.

## PARTNERSHIP.

**Settlement of firm debt by one partner: Liability of other partners.** Acceptance of the individual note of one of two or more members of a partnership who are jointly and severally liable does not constitute a settlement of the claim against the other members of the firm, in the absence of its express acceptance for that purpose. *Craswell v. Pure Bred Cattle Commission Co.*, 9.

**Same: Evidence.** Testimony of the partner giving his note for a firm debt that the other partners understood the transaction to be a full settlement of the partnership liability was inadmissible, because a conclusion drawn from facts not appearing in the record. And as the note in question was signed by the partner in his individual capacity, evidence as to whether he had authority to sign the partnership name was immaterial, especially as his authority to act for the partnership was not an issue. *Idem*.

## PHYSICIANS.

**Malpractice: Negligence: Evidence.** In this action for damages against a physician for his negligence for failing to remove a piece of gauze from the plaintiff's wound after an operation, the physician's evidence was that his method of keeping track of the gauze used in an operation required the nurses to count the pieces used, but it did not appear that that method was followed in plaintiff's case, or that any precaution was taken save tying a knot in

## PHYSICIANS Continued

one of the pieces of gauze used. *Held*, that evidence of the method adopted by the hospital, in which the operation was performed, for keeping track of gauze used was inadmissible. *Reynolds v. Smith*, 264.

**Same: Impeaching evidence.** It appeared in this action that defendant testified on a former trial the same as on this trial of the action that plaintiff was afflicted with a certain disease, and plaintiff on this trial testified that so far as she knew she had never had the disease or any symptoms thereof. *Held*, error to sustain an objection to an inquiry of plaintiff as to whether she gave any testimony on a former trial regarding the matter, as her failure to so testify on the former trial would justify an inference that she acquiesced in the statements of the defendant, and tend to impeach her evidence. *Idem*.

**Same.** There was also evidence that defendant had operated upon the plaintiff previously, and he testified that in disclosing the cause of her trouble at that time he had not said that plaintiff had a specific infliction, and that he had not said at any time that she had a particular disease. *Held*, that error in refusing to permit plaintiff to state whether at the time of the prior operation the defendant had told her she had a particular disease was not prejudicial. *Idem*.

**Custom and usage: Instruction.** Where there was no evidence of the custom or usage of physicians in performing an operation, refusal of an instruction that all required of physicians was that they follow the custom and usage in the performance of operations in the vicinity where they practiced, was proper. And if there had been such evidence refusal to give such an instruction in this case was especially proper, as the evidence showed a failure of the wound to heal and the continuance of suppuration, which, together with the significance of leaving gauze in the wound required a submission of the question of negligence to the jury. *Idem*.

**Negligence.** A physician operating upon a patient at a hospital is not responsible for the acts of nurses and internes in dressing the wound where they were not his employees, unless he was negligent in permitting them to do so. *Idem*.

**Contributory negligence: Instruction.** Where the court instructed the jury to consider what plaintiff did or in the exercise of ordinary care should have done, the charge with reference to contributory negligence was not objectionable in that it failed to direct the attention of the jury to the question of whether

## PHYSICIANS Continued

TO

## PLEADINGS

plaintiff failed to disclose her suffering or symptoms to defendant, which might have suggested the cause thereof. *Idem.*

**Negligence: Evidence.** In this action for malpractice in failing to remove gauze from the wound of plaintiff after an operation, the evidence is held to require submission of the issue of defendant's negligence to the jury. *Idem.*

**PLEADINGS.** See REFERENCE OF CAUSES—USURY.

**Amendment: Damages.** The plaintiff in an action for damages caused by the flooding of his land may amend his petition before verdict so as to increase the amount of damages claimed. *DeLashmutt v. Railway*, 556.

**Amendment: Failure to comply with order of court: Judgment for default.** Where a party fails to amend his pleading within the time fixed by the court a default judgment will be entered against him on the demand of the other party; and in this action in replevin the petition was properly dismissed upon plaintiff's failure to make it more specific as required by the order of the court. *Peterson v. Kissell*, 516.

**Failure to answer interrogatories: Judgment.** A plaintiff is not entitled to judgment upon a failure to answer interrogatories attached to the petition, where, although the answers might tend to sustain plaintiff's claim, they would not necessarily prove the amount which he was entitled to recover. *Big Grove School Dist. v. School Dist.*, 154.

**Same: Interrogatories: Sufficiency of affidavit.** Under the statute providing that a party may file interrogatories with his pleading, the affidavit to the effect that he believes the subject inquired about is within the personal knowledge of the party interrogated, which does not aver that affiant has a personal knowledge of the matter sworn to, when made by an attorney, is insufficient. *Idem.*

**Same: Extension of time to answer interrogatories: Discretion.** While it is incumbent upon a party to answer interrogatories attached to a pleading within the time required to answer the pleading itself, the time may be extended by the court, and the order of extension will not be reversed unless it clearly appears there was an abuse of discretion. *Idem.*

**Election of remedies: Nonprejudicial ruling.** Where the original petition in an action embracing several counts is superseded at the trial by an amended and substituted petition, no prejudice arises by a refusal of the court to require the plaintiff to elect on

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which count of the original petition he will proceed. *Frey v. Stangl*, 522.

**Effect of adverse ruling on demurrer.** Pleading over after an adverse ruling on demurrer is not, under our present statute, a waiver of the right to subsequently raise the same questions in some other manner. *Back v. Back*, 223.

**PRACTICE.** See **APPEAL—CRIMINAL LAW.**

**Continuance: Absent witness.** Where the adverse party admits that an absent witness if present would testify to the matter stated in the affidavit for continuance, a continuance of the cause on the ground of absence of such witness should be denied. *Wasson v. American Patriots*, 142.

**Same: Absence of attorney: Discretion.** Where the record of an application for continuance of a cause on the ground of absence of the party's regular and principal attorney in the case did not show that the attorney present was unprepared or unable to properly try the case, and it appeared that the attorney present had previously appeared in a suit on the same claim and had investigated the cause of action, refusal to grant the continuance was not an abuse of discretion. *Idem.*

**Evidence: Review of ruling: Moot question.** Where a witness affirmatively shows his incompetency to testify on a subject, a review on appeal of the ruling rejecting his evidence presents only a moot question, and the ruling of the trial court for this reason will be sustained. *Bloom v. Sioux City Traction Co.*, 452.

**Reduction of verdict.** Where the court may have found from the evidence that the verdict was excessive, not because of passion or prejudice, but because the jury misconceived the proper measure of damages, the court's action in permitting a reduced verdict to stand rather than setting it aside *in toto* was not error. *Welsh v. Railway Co.*, 200.

**PRINCIPAL AND AGENT.** See **AGENCY.****PURE FOOD.** See **STATUTES.****QUIETING TITLE.** See **TRUSTS.****RAILROADS.**

**Action for death of switchman: Contributory negligence: Evidence.** In this action for the death of a switchman while riding



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the footboard of the engine which was pushing a car, the question of whether decedent was negligent in not being on the car ahead of the engine and keeping a lookout instead of on the footboard of the engine was, under the evidence, for the jury. *Yeager v. Railway Co.*, 231.

**Same: Submission of issues.** Where, as in this action for the death of a switchman, it was not shown to be the duty of the yardmaster to direct the switching crew which track to take in transferring the car, but simply to tell them where to place the car and for them to determine the route, the issue of negligence based upon the omission of the yardmaster to give such instruction and the engineer's act in transferring the car without such direction should not have been submitted to the jury. *Idem.*

**Same: Negligence.** While it was the duty of the switching crew to know upon which track they were moving the engine and car in question they were not necessarily negligent in using the track selected unless it was unsafe. *Idem.*

**Same: Negligence: Evidence.** In this action the question of whether the switching crew were negligent in failing to observe that they were upon a switch rather than the main track is held under the evidence to have been for the jury. *Idem.*

**Same: Contributory negligence: Instruction.** An employee may ordinarily rely upon a discharge of their duty by other employees; and in this action the instruction of the court when construed with reference to the evidence is held unobjectionable, as relieving decedent from the performance of his duty and entitling him to rely wholly upon a performance of the duties of his coemployees to keep a lookout for his safety. *Idem.*

**Same.** Where there was evidence, as in this case, that decedent's proper place was on the footboard of the engine, an instruction that he was bound to use ordinary care to place himself in a position where he might properly perform his work, which included a lookout for obstructions and signaling the engineer, he was negligent if he failed to do so, was proper in view of the evidence. *Idem.*

**Injury to section man: Negligence connected with operation of railway: Fellow servant rule.** A gang of section men engaged in repairing the track, a part performance of whose duty it is to lift their push car from the track to permit the passing of an approaching train, are engaged in a service "connected with the operation of the railway," within the meaning of Code, sec-

## RAILROADS Continued

tion 2071; and if in removing the push car one of the men negligently drops his corner of the car, thus injuring another member of the gang assisting in its removal, the fellow servant rule will not prevent recovery by the one injured. *Cahill v. Ill. Cent. Ry.*, 241.

**Same: Negligence: Evidence.** In this action for injury to a section foreman while the gang were lifting their push car from the track, it appeared that it was the custom for the foreman ordinarily to give a word of warning when ready to set the car down, but that one of the men let go his hold and dropped his corner of the car without warning so to do from anyone, and there was no evidence tending to show that his act was not negligent. *Held*, sufficient to present a question of negligence to the jury. *Idem*.

**Crossings: Easement: Right of adjoining owner.** Permission to use a trestlework as a driveway for teams and cattle will not entitle a landowner to have the same maintained as a private railroad undercrossing, no matter how long such use may have continued. *Hastings v. Railway*, 390.

**Same: Undercrossing: Maintenance.** The assurance by a railroad company that a bridge will be so constructed as to permit the cattle of an adjoining owner to pass under it, is not a recognition of the statutory right to an undercrossing, nor an assurance that such a crossing will be maintained, but such a right amounts to no more than an easement; and while the railroad company can not obstruct the passage it need not maintain it, in the absence of an express agreement to that effect, but this duty devolves upon the landowner. *Idem*.

**Same.** A landowner who is privileged to use an archway under a railroad as a passage for cattle may rightfully go upon the right of way and remove an obstruction therein to the passage of surface water and of his cattle. *Idem*.

**Crossing accident: Contributory negligence: Evidence.** In this action for injury to plaintiff resulting from a collision with a train at a highway crossing, the evidence is held to require submission of the issue of the contributory negligence of plaintiff and the driver of the vehicle. *Stotelmeyer v. Railway*, 278.

**Same: Instructions.** In this action there was evidence that the plaintiff when some distance from the crossing stopped and looked for an approaching train and that when still nearer the crossing he stopped again and looked but saw no train, and it is held that an instruction to the effect that the plaintiff and the driver were

**RAILROADS Continued**

required to look and listen for trains within a reasonable distance from the crossing, and when this was done and no train was seen or heard the jury must determine whether they were bound in the exercise of ordinary care to stop, look and listen at some nearer point to the crossing, was not objectionable as permitting the jury to find that although they stopped, looked and listened on the first occasion and not afterwards they were not negligent; especially as the court in a subsequent instruction cautioned the jury against such an assumption. *Idem*.

**Same: Instruction.** Where it appeared that the driver of a vehicle in which plaintiff was riding looked for an approaching train before driving upon the track and there was none in sight or hearing, plaintiff, though chargeable with any negligence of the driver in this regard, was not guilty of negligence because failing himself to look and listen for the train, but the action of the driver in so looking was a proper circumstance to go to the jury on the question of plaintiff's negligence; and the instruction in submitting this question is not open to the objection that its indirect effect was to impute to plaintiff freedom from contributory negligence because of the statement therein that plaintiff was chargeable with the negligence of the driver. *Idem*.

**Crossing accident: Negligence: Evidence: Question of fact.** Whether defendant's train was run at a speed in violation of the city ordinance when it struck plaintiff upon a public crossing, and whether statutory signals were given of its approach to the crossing were questions for the jury, although the testimony of plaintiff on these questions stood alone and was contradicted by several witnesses for the defendant. *Trout v. Railway Co.*, 135.

**Street railways: Carriage of passengers: Breach of contract: Damages.** Where a passenger upon a street car of his own volition left the car because it was not going to the end of the line as usual, and was thus compelled to walk some distance, his remedy, for failure to carry him the full distance, if any, was for breach of contract; but where, as in this case, there was no evidence of damage he was not entitled to recover; and even though he was entitled to nominal damages failure to allow the same is not ground for reversal. *Gustafson v. Street Ry. Co.*, 388.

**Street railways: Injury to pedestrian: Contributory negligence: Evidence: Instruction.** As bearing on the question of care exercised by plaintiff in going behind a standing street car onto another track on which a car was coming from the opposite direction, it was proper to show that the gong on the coming car was defective, although there was no specific charge of negligence in

## RAILROADS Continued

that respect; and the court's instruction as given excluded a consideration of this evidence on the question of defendant's negligence as charged in the petition, as effectually as the instructions requested and refused. *Dow v. Des Moines Ry. Co.*, 429.

**Same.** In order to recover for injuries received as the result of defendant's alleged negligence the plaintiff must prove freedom from negligence which in any manner contributed to the injury, and the instructions in this case plainly advised the jury on this subject and directed a consideration of all the facts bearing upon this question in determining the same. *Idem.*

**Crossing accident: Care required of pedestrians.** The care required of one about to cross a steam railway track does not apply with equal rigidity to one in crossing a street railway track, especially where the street railway is upon a public street which pedestrians have the right to use; and while one may not go heedlessly upon a street car track he need not be constantly on guard for approaching cars, but the degree of care required is that which an ordinarily careful person would exercise under like circumstances for his own safety. *Idem.*

**Same.** In crossing a street railway track a pedestrian has the right to assume, in the absence of notice or knowledge to the contrary, that cars will be run in accordance with law and custom regarding rate of speed and the giving of signals, and with some reference to the rights of those upon the street; but this rule does not relieve a pedestrian from the exercise of ordinary care and prudence for his own safety. *Idem.*

**Same: Contributory negligence: Evidence.** The plaintiff in this action had crossed the street to post a letter in the mail box of a car, and while recrossing the street and just after stepping out from behind this car was struck by another car on the other track, and the evidence is held to require a submission of the question of her contributory negligence in failing to observe the approaching car. *Idem.*

**Street railways: Injury to passenger: Negligence: Evidence.** In this action for injury to a passenger leaving a street car who passed around the rear of the car, stumbled and fell upon a parallel track and was struck by a car coming from the opposite direction, the evidence is reviewed and it is held that the questions of whether the car, in view of the situation, was being operated at a dangerous rate of speed, and whether had it been operated at a reasonably safe rate of speed the injury would have been averted, were for the jury. *Bloom v. Sioux City Traction Co.*, 452

## RAILROADS Continued

**Same: Contributory negligence.** The evidence is also reviewed and held to present a question for the jury as to plaintiff's contributory negligence. *Idem.*

**Street railways: Operation of cars: Duty of motorman.** The duty of a motorman on a street car, to keep a lookout for persons within or approaching the zone of danger, is greater than that of an engineer in charge of a steam railway engine, operated upon a track where there is no reason to anticipate the presence of people. *Welsh v. Railway Co.*, 200.

**Same: Negligence: Last clear chance: Submission of issue.** Where the evidence, as in this case, showed that the motorman saw plaintiff working near the track, in a position of danger and without apparently noticing the approach of a car, in time to have stopped the car by the exercise of reasonable care and thus have avoided the accident, the defendant was liable for the injury, although plaintiff may have been negligent in placing himself in a position of danger, and the case was properly submitted on that theory. *Idem.*

**Same: Last clear chance.** The doctrine of the last clear chance does not involve a recognition of liability in case of concurrent negligence, nor does it involve any case of comparative negligence, but requires one to use reasonable care for the safety of another in the condition in which the latter, though negligently, may have placed himself. *Idem.*

**Obstruction of surface water: Joint liability of owner and lessee.** It is the duty of a railroad company to construct and maintain a bridge over a stream or ditch constructed for the drainage of surface water so as not to obstruct the passage of water therein, and it is liable in damages to a landowner resulting from failure to do so; and the same duty and liability rests upon a lessee of the railroad; and, as both the lessor and lessee are liable for the proper construction and maintenance of a bridge they may be joined as defendants in the same action. *DeLashmutt v. Railway*, 556.

**Construction and maintenance of bridges: Reasonable care.** It is the duty of a railroad company or its lessee to exercise reasonable care in constructing and maintaining bridges that will permit the free flow of the volume of water that may be reasonably expected to occasionally occur from unusual rainfall, and the instruction in this case states the correct rule. *Idem.*

**Concurrent negligence.** A railroad company is liable to a land-

## RAILROADS Continued

TO

## REAL PROPERTY

owner for the negligent construction of a bridge so as to obstruct the free passage of surface water flowing thereunder, although a ditch for carrying the water may also have been negligently constructed and may have contributed to the injury; the landowner not being responsible in any manner for the construction of the ditch. *Idem.*

**Instruction.** In this action it appeared that the embankment of the ditch gave way and permitted the water to flow over plaintiff's land. The court instructed that if the break in the embankment was caused by the faulty and defective construction of the drainage ditch, or by the faulty and defective construction of the embankment, or the careless and improper manner in caring for and maintaining the ditch or embankment, then and in either event it can not be said that the insufficiency of the waterway at the bridge was the direct and proximate cause of the breaking of the embankment and plaintiff could not recover. *Held*, that the instruction sufficiently advised the jury that the railroad company was not liable if the break in the embankment was caused by the negligent construction of the ditch. *Idem.*

**REAL PROPERTY.****Abstracts of title: Agreement to furnish same: Performance.**

Where abstracts of title were furnished the purchasers of property, taken possession of by them, and were under their charge for a part of the time, and nearly three years after the contract of sale the purchasers exchanged the property purchased for other property, there was an acceptance of the title furnished and a sufficient compliance with the contract to furnish abstracts. *Thornburg v. Doolittle*, 530.

**Same: Abstract of title: Evidence of defects.** As plaintiff's contract obligated him to deliver abstracts of title to the property to the corporation he was under no obligation to furnish them to subscribers to corporate stock who agreed to pay plaintiff certain amounts in consideration of the conveyance. And any conversation concerning defects in the abstracts furnished was not prejudicial to defendant, in this action for the amount due plaintiff from him, where the defect was subsequently remedied and the title accepted. *Idem.*

**Option to purchase.** A mere option to purchase land in accordance with the provisions of a will does not ordinarily confer any rights upon the optionee's representatives or successors. *Mohn v. Mohn*, 288.

REAL PROPERTY Continued	TO	REFERENCE OF CAUSES
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**Oral contract to convey: Part payment: Duty of vendor.** Where the vendee pays money in part performance of an unenforceable oral contract for the purchase of land, the law implies a promise by the vendor to repay the same, or to perform the contract on his part. *Frey v. Stangl*, 522.

**Same: Recovery of money paid in part performance.** An oral contract for the sale of land is enforceable as between the parties unless the making of the contract is denied by the pleadings, as provided by the statute; and a vendee can not repudiate the agreement and recover money paid in part performance where the vendor is ready and able to perform his part of the contract. *Idem*.

**Same: Recovery of amount paid: Demand.** Where the vendor of land by oral contract, as in this case, failed to join with his wife in the execution of a deed to property and left the state without communication with the vendee on the subject, the vendee was entitled to recover the amount paid on the contract without previous demand. *Idem*.

**Evidence: Motion to strike.** A motion to strike the entire answer to an interrogatory should be denied where a portion of the answer was proper. *Idem*.

**Sale of real property situate in a foreign state: Jurisdiction of proceeds.** Although the court has no jurisdiction to partition land situated in another state it does have jurisdiction over actions *in personam*, and may entertain actions to secure a conveyance of the land or declare a trust therein. So that where lands in another state were sold pending actions involving the right thereto, the proceeds arising from the sale partake of the nature of real estate and may be followed into the hands of the seller and disposed of by a court having jurisdiction of his person. *Sullivan v. Kenney*, 361.

## REFERENCE OF CAUSES.

**Filing of pleadings before referee.** A referee to whom a cause has been referred for trial by the court has the same power under the statutes to permit the filing of original as well as amended pleadings, even though the effect of the pleadings is to present new issues which were not before the court at the time of the submission. *Poitevin v. Binnall*, 249.

**Same: Discretion.** Where a reply was filed before a referee after the proper time, upon grounds which were contested but found sufficient, the discretion exercised in permitting the filing of the same can not be disturbed on appeal. *Idem*.

REFERENCE OF CAUSES Continued

TO

SALES

**Same: Resubmission of cause.** The court has power to order a reference for trial of an action to quiet title, either with or without consent of the parties, and to set the reference aside and re-submit the case. *Idem.*

## REPLEVIN. See ACTIONS.

### **Pleadings: Dismissal of action for default: Extent of judgment.**

In this action the plaintiff replevied cattle, alleged his ownership and that they were distrained by defendant, but the petition was dismissed before answer because of plaintiff's failure to make it more specific as ordered, and judgment entered against plaintiff and his sureties on the replevin bond for the value of the cattle. *Held*, that the dismissal of the action merely precluded plaintiff from proving the facts alleged in the petition, and the only judgment which could be entered was one awarding possession of the cattle to defendant or their value, and that the question of title could not be adjudicated because not put in issue by defendant. *Peterson v. Kissell*, 516.

## RESCISSION. See CONTRACTS.

## RESIDENCE. See TAXATION.

## SALES.

**Conditional sales: Mortgages: Priority of liens.** The seller of personal property under an unrecorded contract of conditional sale can not, by a seizure of the property for nonpayment prior to the recording of a mortgage given by the purchaser upon the property, put himself in the position of a subsequent purchaser without notice. *Swayne v. Tillotson*, 501.

**Warranty: Notice of defects: Evidence.** The purpose of the provision in a contract for the sale of machinery that the purchaser shall give the seller notice of defects therein is to afford the seller an opportunity to inspect the machinery and remedy the defects; and where the seller has been given actual notice and has acted upon the same as fully as he could have done had formal written notice been given as required by the contract, he is in no position to complain of the notice. It is also the general rule that an agent having power to sell machinery under a contract which contains conditions for the benefit of the seller has authority to waive such conditions. In this action for the price of machinery sold under a contract giving the purchaser a stated time for its trial and providing for written notice of defects to the seller and local agent, it is held that the verbal notice to the agent



## SALES Continued

TO

## STATUTES

who acted upon the same and attempted to remedy the defects, and written notice to the seller within the time allowed for a trial of the machinery, were sufficient. *Reeves & Co. v. Younglove*, 699.

**Same: Breach of warranty: Waiver.** It is also held that as the agent after an unsuccessful attempt to remedy the defects in the machinery informed the buyer that the same belonged to him and that he would have to pay for it, the buyer was justified in believing that the seller would not accept a return of the machinery or do anything further towards fulfilling the conditions of the warranty, and his failure to return the machinery as required by the contract does not preclude him from relying upon a breach of the warranty. *Idem*.

**Same: Breach of warrant: Recovery of damages.** Under a contract for the sale of machinery which provides that the buyer shall settle therefor by payment of freight and the giving of notes for the price, for a trial of the machinery and return thereof if it fails to comply with the warranty, the buyer may recover the freight paid where the warranty is not fulfilled. *Idem*.

**SEDUCTION.** See CRIMINAL LAW.

**SCHOOLS.**

**Formation of consolidated districts: Territorial limits.** The territory of a consolidated independent school district organized under the provisions of Code Supplement, section 2794a, can not be reduced to less than sixteen government sections, by taking territory therefrom for the organization of a new consolidated independent district. *State v. Board of Directors*, 487.

**SPECIFIC PERFORMANCE.** See EQUITY.

**STATUTES.** See CARRIERS—HIGHWAYS.

**Constitutional law: Property rights: Due process: Police power.** The statutes prohibiting the manufacture and sale of flaxseed or linseed oil unless it answers the purity test recognized by the government, and that such oil shall be sold only under its true name, or not in violation of the federal constitution guaranteeing property rights to citizens in every state, or of the state constitution providing that no person shall be deprived of his property without due process of law; but the same are within a proper exercise of the police power of the State. *State v. Holton, Gray & Co.*, 724.

## STATUTES Continued

**Same: Exercise of police power.** The state may exercise its police powers to protect its citizens against fraud when its frequency or difficulty in detecting or preventing the same is so great that no other means will prove effective. *Idem.*

**Constitutional law: Hotels: Arbitrary classification: Statute.**

The Act of the 33d General Assembly providing for the inspection of hotels and declaring that every structure kept, used, advertised, or held out to the public to be an inn, hotel or public sleeping house, or place where sleeping accommodations are furnished for hire to transient guests, in which ten or more sleeping rooms are used for the accommodation of guests, shall be deemed a hotel within the meaning of the Act, is not unconstitutional because making an arbitrary and unreasonable classification of hotels, in that it is confined in its application to hotels having a certain number of rooms, or that it refers simply to hotels which receive transient guests. *Hubbell v. Higgins*, 36.

**Same: Delegation of legislative power.** Nor is the statute unconstitutional because delegating legislative power to a hotel inspector, provided for therein, in that it authorizes him to arbitrarily determine whether a hotel is of approved fire proof construction or maintained in approved sanitary condition; since the Act does not confer upon him arbitrary power in these respects but simply requires him to determine in given cases whether hotels are in fact of such construction. And the same is true concerning his authority over sanitary matters and other like features of the act. *Idem.*

**Same: Hotels: Sanitary regulation: Enforcement.** Nor does the provision that all hotels shall be kept and maintained in a clean and sanitary condition, free from gas or offensive odors arising from designated sources, or from any other source, within the control of the owner or person in charge, operate to confer on the inspector arbitrary power to declare a nuisance because of offensive odors. *Idem.*

**Same: Due process of law: Search.** The legislature in the exercise of its police power may provide for the inspection of hotels in the interest of public safety and health; and this right of inspection is a mere incident of such power, an exercise of which violates no constitutional guaranty against the right of entry upon private property and search without due process of law. *Idem.*

**Same: Imprisonment for debt.** The provision of the statute in question which makes a failure to pay the inspector's charge a misdemeanor and punishable by fine and imprisonment is invalid,

## STATUTES Continued

TO

## TAXATION

because in violation of the constitutional provision which prohibits imprisonment for debt. But as that provision is not essential to the remainder of the act it may be eliminated leaving the act in all other respects valid. *Idem*.

**STATUTE OF FRAUDS.**

Where the vendor denies making an alleged oral contract for the sale of land and pleads the statute of frauds the vendee may recover the amount paid in part performance. *Frey v. Stangl*, 522.

**Contracts: Performance by one party.** Where the devisee of a remainder conveys his interest in the property to the life tenant, in consideration of an agreement by the life tenant to will the property to him, together with an interest in the life tenant's own property, the statute of frauds is not an obstacle to an enforcement of the agreement, because of performance of the contract by the remainderman. *Chantland v. Sherman*, 352.

**Purchase of land: Oral contract: Statute of frauds: Evidence.**

An oral contract for the purchase of land is taken out of the statute of frauds where the vendee has taken possession under the contract, or where there is any other circumstance which, by the law in force when the statute was passed, would have taken the case out of the statute.

In the instant case the devisee taking the property charged with the widow's life estate and the payment of a stipulated price to other heirs, was, at the time of testator's death, living with him upon the property and managing the same, and subsequently continued the occupancy with the widow as her tenant. Thereafter pursuant to an oral contract for the purchase of the widow's interest she surrendered complete possession and the devisee made extensive improvements.

*Held*, sufficient to show a contract of purchase and to take the same out of the statute of frauds. *Mohn v. Mohn*, 288.

**STREET RAILWAYS.** See RAILROADS.**TAXATION.**

**Burial grounds: Exemptions.** The unsold lots of a burial ground held and owned by a private individual for sale at a profit are not exempt from taxation under the provisions of the statute exempting public grounds, including places for burial of the dead, from which no dividend or profits will be derived: Nor is there an implied exemption of the same growing out of any question of public policy. *Simcoke v. Sayre*, 132.

## TAXATION Continued

TO

## TELEGRAPHS AND TELEPHONES

**Charitable bequests: Exemption.** A devise of the use, rents and profits of certain lands in perpetuity to the dependent poor of a specified county who are maintained wholly or in part by the county, and constituting the board of supervisors of said county trustees to receive and carry the trust into effect, is a charitable gift to the county as a charitable institution, and is exempt from the inheritance tax. In re Estate of Spangler, 333.

**Collateral inheritance tax: Charitable bequests: Exemption: Appointment of trustee.** A bequest to a religious or charitable society incorporated under the laws of a foreign state, with power to expend the bequest wherever the society may see fit, is not exempt from the collateral inheritance tax: But when made to a local branch of such a society, as the Salvation Army, and to be expended within this state, the exemption applies, although the society may be incorporated elsewhere.

And the trust will not be allowed to fail though the trustee named has no legal existence; as the court in such cases may appoint a trustee. In re Estate of Crawford, 60.

**Moneys and credits: Where assessable.** The place where a person lives, within the meaning of the statute relating to the taxation of moneys and credits, is the place of his residence. Glotfelty v. Brown, Treasurer, 124.

**Same: Residence: Burden of proof.** Where it is shown that the residence and domicile of a party has until recently been in this state, it is incumbent upon him to show that he has acquired a new residence or domicile elsewhere, to avoid the payment of taxes in Iowa. *Idem.*

**Same.** Mere intention to change one's place of residence is not sufficient to avoid taxation; it must be accompanied by actual residence in a new location. *Idem.*

**TAX TITLE.** See MORTGAGES.

## TELEGRAPHS AND TELEPHONES.

**Telegraphs: Delay in delivery: Damages: Notice.** In this action for damages for negligent delay in the delivery of a telegram it is held that a letter written by plaintiff's employer notifying the telegraph company of the delay, and reciting that plaintiff's employer demanded damages in settlement of the claim, did not constitute a notice of any claim by plaintiff, as required by the statute, and was insufficient to sustain an action by him. Brockelsby v. Telegraph Co., 273.

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## TELEGRAPHS AND TELEPHONES Continued TO

## TORTS

**Same: Joint cause of action.** Although a telegraph company may be liable to either or both the sender and sendee for delay in delivering a message it does not follow that they have a joint cause of action. *Idem.*

**Same: Notice of claim.** Although the filing of a petition in an action alleging damages for negligent delay in the delivery of a telegram and the personal service of an original notice may be sufficient notice to the telegraph company of the claim, as required by the statute, still the filing of the petition and service of the notice must be within sixty days from the time the cause of action accrued to be available as a statutory notice. *Idem.*

**Telephones: Negligent delay: Pleadings: Burden of proof.** The delay in the transmission of a telephone message as contemplated by the statute is ordinarily failure to furnish proper connections for personal communication within a reasonable time, as well as in otherwise transmitting messages; and upon a showing of unreasonable delay the burden is placed upon defendant to establish by a preponderance of the evidence that the delay was not due to negligence on its part. But where the petition alleges particular acts of negligence occasioning the delay, rather than negligence in that respect generally, the defendant is only required to prove absence of negligence with respect to the acts alleged. *Volquardsen v. Iowa Telephone Co., 77.*

**Same: Negligence: Proximate cause: Evidence.** While a telephone company is liable under the statute for failure to give reasonably prompt connections to a subscriber, only such damages can be recovered as are the proximate result of the proven unreasonable delay. In this action the evidence is held insufficient to show that the destruction of plaintiff's building and machinery by fire was the direct and proximate result of defendant's negligent delay in failing to furnish plaintiff with prompt telephone connections so that he might give a fire alarm. *Idem.*

**TENDER.** See **CONTRACTS.**

**TORTS.**

**Remote and speculative damages: Evidence.** While it may be necessary to show that the injury resulting from a wrongful act was one that might have been reasonably anticipated, still there can be no recovery in the absence of proof that the injury resulted as a consequence of the wrongful act. In this action involving a counterclaim by the husband for damages resulting from a claimed personal injury to his wife, the evidence that

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TO

Usury

the injury complained of was the result of plaintiff's wrongful act is held insufficient to authorize submission of the counterclaim to the jury. *Parkinson v. Kortum*, 217.

## TRUSTS.

**Resulting trusts: Evidence of intent.** A resulting trust in favor of one paying the purchase price of land and taking the title in the name of another will not be established except upon clear and satisfactory evidence that the person so furnishing the money intended to take an interest in the property. *DeFrance v. Reeves*, 348.

**Same.** Where the husband furnished the money to purchase land taking the title in his wife's name, no trust resulted *prima facie* in his favor, but it will be presumed that the furnishing of the purchase price was an advancement to the wife. *Idem*.

**Same: Action to quiet title: Evidence.** In this action by the husband to quiet title to land on the ground that it was purchased with his money and the title taken in his wife's name, the evidence is held to show that the same was purchased either with the wife's money or that the title was placed in her name to defeat plaintiff's creditors, and in neither event was the husband entitled to relief. *Idem*.

**Resulting trusts: Evidence.** In this action to establish a resulting trust in land in favor of a son, the legal title to which was in his parents, on the ground that the son furnished the money for the purchase of the land with the understanding that the same was to be his property, the evidence is held insufficient to establish the trust. *Adams v. Craig*, 705.

## USURY.

**Pleadings: Sufficiency.** Where the petition in an action for the recovery of instruments evidencing an indebtedness from plaintiff to defendant disclosed that the return of the instruments was sought on the ground that the money borrowed in the transaction had been fully paid, with lawful interest, and that under the facts alleged defendant was not entitled to retain the instruments unless some of the payments were made as commissions for procuring the loan, the question of usury was in issue and was properly submitted to the jury. *Griswold v. Dugane*, 504.

**Same.** Any agreement made by a borrower with one acting as the agent of the lender to pay a commission in addition to the

Usury Continued

TO

WATERS

maximum rate of interest will render the transaction usurious.  
*Idem.*

## VENUE.

**Change of venue: Passion and prejudice: Discretion: Evidence.**

Where the evidence in support and in resistance of a motion for change of venue, on the ground of passion and prejudice, presents a substantial conflict, the action of the trial court in overruling the motion will not be disturbed. In this action the evidence in support of a change consisting of newspaper comments is held insufficient to incite a disregard of the proper administration of the law, either on the part of the judge or jury. *State v. Dean*, 566.

**WARRANTIES.** See **CONTRACTS—SALES**

## WATERS.

**Flood waters: Obstruction: Unprecedented rainfall: Instruction.** In this action for flooding plaintiff's land by the obstruction of a creek defendant sought to show that it was the result of unprecedented rainfall, and there was evidence of high water in other years. *Held*, that an instruction to the effect that although the water might have been as high many years ago on a single occasion that fact would not necessarily mean that the particular flood complained of was unprecedented, was properly refused. *Hastings v. Railway*, 390.

**Same: Measure of damages.** Where the evidence tends to show that the use of a farm as a whole is rendered more inconvenient and less profitable because of the injury to some part thereof by flood water, the measure of damages is the difference in value of the entire farm immediately before and immediately after such injury, rather than the injury to the particular part of the land flooded. *Idem.*

**Same.** Where a railroad company negligently fails to maintain a sufficient opening under its tracks for the passage of surface water, thus causing a deposit of sediment in the bed of the stream and in the passageway under the track, to the injury of an adjoining owner, the expense of clearing the opening would be an element of the adjoining owner's damage. But where the landowner sues for failure to keep the archway open as an independent cause of action he can not recover for depreciation in the rental value of his farm. *Idem.*

## WILLS

**WILLS.** See also ESTATES OF DECEDENTS.

**Agreement to devise: Consideration.** Where a will gives to the widow simply control over the property during her life, a conveyance to her by the remainderman of his interest therein will constitute a sufficient consideration for an agreement by the widow to devise a portion of the property to such remainderman. *Chantland v. Sherman*, 352.

**Same: Breach of agreement: Relief.** While an agreement to devise property can not be specifically enforced during the life of the promisor, yet upon repudiation of the agreement or disposition of the property to be willed a cause of action may accrue, and its enforcement for analogous relief by way of rescission or the recovery of damages may be had. *Idem*.

**Allowance to widow and children.** The amount set apart and applied to the support of the widow and minor children of a decedent is not a part of the estate for distribution; nor is the right thereto an interest in the estate inconsistent with the widow's acceptance of the provisions of a will for her benefit. *Hamilton v. Hamilton*, 127.

**Same: Election by widow: Rents and profits.** It is presumed that a widow named as executrix will administer the estate in accordance with the terms of the will, and will accept the provisions therein for her benefit, until she elects otherwise: So that where the widow, as in this case, was the executrix under the will and was given a life estate in certain lands, she was under no obligation to account for rents and profits, although she may have delayed filing her election to accept the provisions of the will. *Idem*.

**Construction: Advancements.** In the construction of the will and codicil in question it is held that the language of the will indicates an intention of the testator to distribute his property among his children equally, upon the death of his wife, and in doing so that advancements to certain of his children should be deducted from their respective share, and in determinating the extent of the estate the same were to be considered as a part thereof. And it is also held that the codicil was intended to charge the share of one of the heirs with certain advancements, and in case her share of the personalty was not sufficient to cover the same her interest in lands devised to her was to be charged therewith. *Skinner v. Cottrill*, 633.

**Construction: Life estate.** Where a will gives to the widow land during her life or during her widowhood, and provides that upon



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her death a son shall have it at a specified price, the proceeds to be divided among the children, the widow takes a life estate. *Mohn v. Mohn*, 288.

**Same: Devise to widow: Distributive share: Election: Statutes.**

Under our prior statutes the widow might ordinarily take both a life estate and a distributive share in her husband's property, but where by the terms of a will she was given a life estate in the property, and a claim to her distributive share in addition to the devise created such an inconsistency as to defeat some provision of the will, she could not take both but was required to elect which she would take. *Idem*.

**Same: Election by widow: Sufficiency.**

The report of a widow as executrix showing full settlement of the estate, in which she claimed that she was entitled to a life estate under the will and asked for a discharge, was a sufficient election to take a life estate in lieu of dower. *Idem*.

**Same: Construction: Estate devised.**

A will providing that on the death of a life tenant a certain heir shall have the land at a specified price, and that the proceeds thereof shall be divided among all the children, operates as a gift of the land to such heir charged with payment of the price to the other children, rather than a mere option to purchase the same. *Idem*.

**Same: Who may question decree.**

A widow who is given only a life estate in property can not complain of a decree creating a vested interest therein in another. *Idem*.

**Same: Acceptance of bequest: Presumption.**

The devisee of a beneficial interest under a will will be presumed to have accepted the same; but he may withhold his assent and renounce the provisions made for him, in which case no interest passes to him. *Idem*.

**Same: Bequest subject to a charge upon the property: Passing**

**of title.** Where a testator bequeaths the life use of his real estate to his wife and upon her death to a certain heir at a specified price, the proceeds to be equally divided among all his children, and there is no gift over in case such heir elects not to purchase, it is generally held that the devise creates simply a charge upon the land, and is not a condition precedent to the passing of title. *Idem*.

**Same: Contingent remainder.**

Even though such a bequest should be held to create a contingent remainder, the contingency is one of event and not of person, and such an estate may be sold and

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will also pass to the devisee's successors. But in the instant case the devisee elected to accept the bequest, and thus obligated himself and his heirs to pay the charges against the same. *Idem*.

**Contest: Mental capacity: Submission of issue: Evidence.**

Where, as in this case, the defendants in a will contest failed to move for a directed verdict and asked the court to submit an interrogatory on the question of mental capacity of the testator, which was done, this amounted to a practical concession that the case was one for the jury. But aside from this fact the evidence was such as to clearly require a submission of the issue. *Mileham v. Montagne*, 476.

**Same: Immaterial evidence.** Where a testator gave nothing to one of his daughters for the reason that her husband would spend it all, as stated in his will, evidence of the personal habits of the husband at the time of trial was immaterial. *Idem*.

**Same: Mental capacity: Evidence.** It was claimed by contestants in this action that testator's mind had been affected by the murder of a relative several years prior to the execution of his will and it is held that evidence of the circumstances of the murder was admissible, on the promise of counsel to show that testator knew the circumstances testified to, and that these matters had affected his mind. *Idem*.

**Same.** Evidence that the testator had been committed to a hospital for the insane, although several years prior to the making of his will; what took place between the testator and the witness while he was being taken to the hospital; and his subsequent discharge as sane, were competent on the question of his mental capacity at the time of the execution of his will. *Idem*.

**Evidence: Inequitable provisions: Instructions.** Inequality and inequity in the provisions of a will will not alone warrant the presumption of mental incapacity, but they may and should be considered as circumstances in connection with other facts bearing on the condition of the testator's mind at the time of executing the will, in determining his mental capacity. *Idem*.

**Same: Mental capacity: Evidence: Instruction.** Evidence of the fact that a testator transacted his own business and seemed to be mentally competent to those with whom he came in contact, while competent on the question of capacity, will not conclusively establish his sanity; as a state of mental unsoundness may still exist which would render him incompetent to make a will; and impairment of the mental faculties which destroys testamentary

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capacity disqualifies one from making a will, even though it has not reached the state of absolute imbecility. *Idem*.

**Probate of foreign wills: Authentication of proceedings: Objections: Waiver.** The proponent of a foreign will by pleading over and attempting to meet objections to the probate in this state, on the ground that the proceedings in the foreign court were not properly authenticated, waives any error in the ruling sustaining the objection. *Sullivan v. Kenney*, 361.

**Probate of foreign will: Authentication.** The authentication of the probate of a will in a foreign state consisting of a copy of the will, the record of its probate, attestation by the clerk of court and the certificate of the judge that his attestation was in due form, is sufficient to authorize admission of the will to probate in this state as a foreign will. *Idem*.

**Same: Jurisdiction.** Mental capacity and undue influence are questions which do not go directly to the jurisdiction of a foreign court to probate a will, but the testator's mental capacity may be considered on the question of his change of domicile as bearing upon the jurisdiction. *Idem*.

**Same.** A foreign judgment admitting a will to probate may be attacked for want of jurisdiction although the court rendering the judgment expressly found that it had jurisdiction. *Idem*.

**Same: Probate: Production of original will.** Where it is claimed that a will is entitled to probate as a domestic will the original instrument must be produced. *Idem*.

**Probate: Burden of proof.** In a proceeding to probate a will made and probated in a foreign state the burden is upon the contestants to show that the foreign court had no jurisdiction; and this involves an affirmative showing that the testator was not domiciled within the jurisdiction of the foreign court at the time of his death, where that question is in issue. *Idem*.

**Undue influence.** The evidence in this action is also held to show that a will of the grantor leaving his entire estate to a daughter, to the exclusion of his other heirs, was obtained by fraud and undue influence. *Idem*.

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